No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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2:06cv3882

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Date	#	Proceeding Text
8/17/2006	1	COMPLAINT against CITY OF PATERSON, Jose Torres, JAMES WITTIG, MICHAEL WALKER (Filing fee $ 350 receipt number 1106275.) JURY DEMAND, filed by JEFFREY J. HEFFERNAN. (lm2,) (Entered: 08/18/2006)
11/28/2006	3	ANSWER to Complaint with Jury Demand by CITY OF PATERSON.(RIVAS, ALBERTO) (Entered: 11/28/2006)
1/26/2009	39	MOTION in Limine by JEFFREY J. HEFFERNAN. (ZEFF, GREGG) (Entered: 01/26/2009)
01/26/2009	40	MOTION for Summary Judgment Notice of Defendants' Motion for Summary Judgment by CITY OF PATERSON, Jose Torres, JAMES WITTIG, MICHAEL WALKER. Responses due by 2/17/2009 (Attachments: # 1 Brief Memorandum of Law in Support of Defendants Motion for Summary Judgment, # 2 Certification of Victor A. Afanador, # 3 Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts in Support of Motion for Summary

		Judgment, # 4 Text of Proposed Order, # 5 Certificate of Service) (AFANADOR, VICTOR) (Entered: 01/26/2009
02/09/2009	41	TRIAL BRIEF by JEFFREY J. HEFFERNAN. (ZEFF, GREGG) (Entered: 02/09/2009)
02/09/2009	46	TRIAL BRIEF of Defendants by CITY OF PATERSON, Jose Torres, JAMES WITTIG. (Attachments: # 1 Appendix to trial brief) (AFANADOR, VICTOR) (Entered: 02/09/2009)
02/24/2009	53	FINAL PRETRIAL ORDER. Signed by Magistrate Judge Esther Salas on 2/24/09. (Attachments: # 1 Part 2, Final Pretrial Order) (dc,) (Entered: 02/24/2009)
04/17/2009	76	JURY VERDICT filed 4/17/09. (dh,) (Entered: 04/23/2009)
04/17/2009	77	JURY VERDICT on Punitive damages filed on 4/17/09. (dh,) (Entered: 04/23/2009)
04/27/2009	78	JUDGMENT in favor of JEFFREY J. HEFFERNAN against JAMES WITTIG, JOSE TORRES in the amount of $37,500.00 each; on Punitive damages in favor of JEFFREY J. HEFFERNAN against JAMES WITTIG, JOSE TORRES in the amount of $15,000.00 each. Signed by Judge Peter G. Sheridan on 4/24/09. (dc,) (Entered: 04/27/2009)

3/8/2013	185	Cross MOTION for Summary Judgment *returnable April 1, 2013* by Jose Torres. Responses due by 3/18/2013 (Attachments: # 1 Certification of filing and service, # 2 Certification of Albert C. Lisbona, # 3 Statement of Non-Necessity of Brief, # 4 Text of Proposed Order, # 5 Cover letter of enclosure) (LISBONA, ALBERT) (Entered: 03/08/2013)
3/8/2013	186	MOTION for Summary Judgment by JAMES WITTIG. Responses due by 3/22/2013 (Attachments: # 1 Cover Letter, # 2 Text of Proposed Order, # 3 Certificate of Service) (JEAN, ROOSEVELT) (Entered: 03/08/2013)
3/8/2013	187	MOTION for Summary Judgment by Jose Torres. Responses due by 3/22/2013 (Attachments: #1 Text of Proposed Order, # 2 Certificate of Service) (POTTERS, GARY) (Entered: 03/08/2013)
3/8/2013	188	MOTION for Summary Judgment by JAMES WITTIG. Responses due by 3/22/2013 (Attachments: # 1 Text of Proposed Order) (SCRIVO, THOMAS) (Entered: 03/08/2013)
3/8/2013	189	Joint MOTION for Summary Judgment by CITY OF PATERSON. (Attachments: # 1 Brief In Support of Defendants' Joint Motion for Summary Judgment, # 2 Statement of Undisputed Material Facts pursuant to Rule 56.1(a), # 3 Certification

of Victor A. Afanandor, # 4 Exhibit A of Victor A. Afanandor, # 5 Exhibit B (part 1 of 2) of Victor A. Afanandor, # 6 Exhibit B (part 2 of 2) of Victor A. Afanandor, # 7 Exhibit C of Victor A. Afanandor, 8 Exhibit D of Victor A. Afanandor, # 9 Exhibit E of Victor A. Afanandor, # 10 Exhibit F of Victor A. Afanandor, # 11 Exhibit G of Victor A. Afanandor, # 12 Exhibit H of Victor A. Afanandor, # 13 Exhibit I of Victor A. Afanandor, # 14 Exhibit J of Victor A. Afanandor, # 15 Exhibit K of Victor A. Afanandor, # 16 Exhibit L of Victor A. Afanandor, # 17 Exhibit M of Victor A. Afanandor, # 18 Exhibit N of Victor A. Afanandor, # 19 Exhibit O of Victor A. Afanandor, # 20 Exhibit P of Victor A. Afanandor, # 21 Exhibit Q. of Victor A. Afanandor, # 22 Exhibit R of Victor A. Afanandor, 23 Certification of Gary Potters, Esq. with Exhibits, # 24 Certification of Victor A. Afanador, Esq., Regarding Trial Transcript, # 25 Text of Proposed Order) (AFANADOR, VICTOR) (Entered: 03/08/3013)

3/8/2013 190 MOTION for Summary Judgment *as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment* by JEFFREY J. HEFFERNAN. Responses due by 3/22/2013 (Attachments: # 1 Text of Proposed Order,

		# 2 Statement of Facts Pursuant to Local Rules 56.1, #3 Certification of Plaintiffs Counsel Ryan Lockman, # 4 Brief, # 5 Exhibit A-JJ) (LOCKMAN, RYAN) (Entered: 03/08/2013)
4/5/2013	196	BRIEF in Opposition filed by CITY OF PATERSON re 190 MOTION for Summary Judgment *as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment* (Attachments: # 1 Certification of Victor A. Afanador) (AFANADOR, VICTOR) (Entered: 04/05/2013)
4/5/2013	197	RESPONSE in Opposition filed by JEFFREY J. HEFFERNAN re 187 MOTION for Summary Judgment, 186 MOTION for Summary Judgment, 189 Joint MOTION for Summary Judgment, 188 MOTION for Summary Judgment, 185 Cross MOTION for Summary Judgment *returnable April 1, 2013* (Attachments: # 1 Statement Plaintiff's Response to Defendants' Statement of Facts Pursuant to Local Rule 56.1, # 2 Statement Plaintiff's Counter-Statement of Facts Pursuant to Local Rule 56.1, # 3 Brief, # 4 Exhibit A-QQ) (LOCKMAN, RYAN) (Entered: 04/05/2013)
4/19/2013	200	BRIEF in Support filed by JEFFREY J. HEFFERNAN re 190 MOTION for

		Summary Judgment as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment – Plaintiff's Reply Brief In Support of the Motion, (LOCKMAN, RYAN) (Entered: 04/19/2013)
4/19/2013	201	BRIEF in Support filed by CITY OF PATERSON re 189 Joint MOTION for Summary Judgment (Attachments: # 1 Statement) (AFANADOR, VICTOR) (Entered: 04/19/2013)
3/5/2014	205	OPINION. Signed by Judge Kevin McNulty on 3/5/14. (gmd,) (Entered: 03/05/2014)
3/5/2014	206	ORDER that the motion for summary judgment of Defendant Police Chief James Wittig is GRANTED; that the motions for summary judgment of Defendants Mayor Jose Torres and City of Paterson are GRANTED IN PART, but are DENIED IN PART to the extent they seek summary judgment on grounds pertaining to them individually which have been rendered MOOT; that Plaintiff's Motion for partial summary judgment is DENIED; and that the Complaint is DISMISSED WITH PREJUDICE. * * * CIVIL CASE TERMINATED * * * Signed by Judge Kevin McNulty on 3/5/14. (gmd,) (Entered: 03/05/2014)

3/12/2014	207	NOTICE OF APPEAL as to 205 Opinion, 206 Order on Motion for Summary Judgment,,,,,,,,,,,, by JEFFREY J. HEFFERNAN. Filing fee $ 505, receipt number 0312-5557569. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. Appeal Record due by 4/4/2014. (LOCKMAN, RYAN) (Entered: 03/12/2014)
1/22/2015	209	USCA JUDGMENT Affirming Order/ Judgment of the District Court as to 207 Notice of Appeal (USCA), filed by JEFFREY J. HEFFERNAN (ca3cjg) (Entered: 01/22/2015)
2/23/2015	210	MANDATE of USCA issued. (Attachments: # 1 mandate letter, # 2 opinion) (Entered: 02/23/2015)

Relevant Docket Entries for the United States District Court For the Third Circuit Court of Appeals

14-1610

03/13/2014	CIVIL CASE DOCKETED. Notice filed by Appellant Jeffrey J. Heffernan in District Court No. 2-06-cv-03882. (PDB)
03/13/2014	RECORD available on District Court CM/ECF. (PDB)
08/11/2014	ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of Service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
09/15/2014	ECF FILER: JOINT ELECTRONIC BRIEF on behalf of Appellees City of Paterson, Jose Torres and James Wittig, filed. Certificate of Service dated 09/15/2014 by ECF. [Modifier added] – [Edited 09/16/2014 by EMA] (ACL)

09/29/2014	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of Service dated 09/29/2014 by ECF. (RML)
09/30/2014	Calendared for Thursday, 12/11/2014. (PM)
11/25/2014	Submit Notification for Thursday, 12/11/2014. (PM)
12/11/2014	SUBMITTED on Thursday, December 11, 2014. Panel: VANASKIE, GREENBERG, COWEN, Circuit Judges. (PM)
12/11/2014	COURT MINUTES OF ARGUED/ SUBMITTED CASES. [13-3498, 14-1287, 14-1610, 14-1623, 14-2729] (PM)
01/22/2015	PRECEDENTIAL OPINION Coram: VANASKIE, GREENBERG and COWEN, Circuit Judges. Total Pages: 14. Judge: VANASKIE Authoring. [Opinion was docketed as a Not Precedential. The Opinion is a Precedential Opinion and has been corrected. Notice is being resent.]-[Edited 01/22/2015 by CJG] (CJG)
01/22/2015	JUDGMENT, Affirmed. Costs taxed against Appellant. (CJG)
02/02/2015	ECF FILER: Petition filed by Appellant Jeffrey J. Heffernan for Rehearing before original panel and the court en banc. Certificate of Service dated 02/02/2015. (RML)

02/13/2015	ORDER (MCKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, SHWARTZ, KRAUSE, GREENBERG and COWEN, Circuit Judges) denying Petition for Panel and En Banc Rehearing filed by Appellant Jeffrey J. Heffernan, filed. Vanaskie, Authoring Judge. *The votes of the Honorable Robert E. Cowen and the Honorable Morton I. Greenberg are limited to panel rehearing only. (TMM)
02/23/2015	MANDATE ISSUED, filed. (TMM)
04/27/2015	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Jeffrey J. Heffernan on 04/22/2015 and placed on the docket 04/24/2015 as Supreme Court Case No. 14-1280. (CND)
10/01/2015	NOTICE of U.S. Supreme Court disposition at No. 14-1280. Petition for Writ of Ceriorari filed by Jeffrey J. Heffernan granted on 10/01/2015. (LML)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN, 1 Emmanuel Avenue Wayne, NJ 07470, Plaintiff, v. CITY OF PATERSON, 155 Market Street Paterson, NJ 07505, and MAYOR JOSE TORRES, Individually and as Mayor of the City of Paterson, 155 Market Street Paterson, NJ 07505, and POLICE CHIEF JAMES WITTIG, Individually and as Chief of the City of Paterson Police Department, 111 W Broadway Paterson, NJ 07522, and POLICE DIRECTOR MICHAEL WALKER, Individually and as Director of the City of Paterson	CIVIL ACTION NO. JURY TRIAL DEMANDED,

Police Department :
111 W Broadway :
Paterson, NJ 07522, :
:
Defendants. :

CIVIL ACTION – COMPLAINT

(Filed Aug. 17, 2006)

Plaintiff Jeffrey J. Heffernan, by and through his attorneys, Frost & Zeff, hereby brings this Complaint against Defendants City of Paterson, Mayor Jose Torres, Police Chief James Wittig and Police Director Michael Walker, and in support thereof avers as follows:

I. INTRODUCTION

1. This action for declaratory, injunctive, monetary and other appropriate relief is brought by Plaintiff Jeffrey J. Heffernan to redress the intentional violations by Defendants City of Paterson, Mayor Jose Torres, Police Chief James Wittig and Police Director Michael Walker, of the rights secured to him by the laws of the United States of America and the State of New Jersey.

II. JURISDICTION

2. This action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343(3) and the aforementioned statutory and constitutional provisions.

3. Jurisdiction lies over state law claims based on the principles of supplemental jurisdiction, as codified at 28 U.S.C. § 1367

4. The amount in controversy exclusive of interest and costs exceeds the sum of One Hundred Thousand ($100,000.00) Dollars.

III. VENUE

5. All the claims herein arose within the jurisdiction of the United States District Court for the District of New Jersey and involve Defendants who reside within the jurisdictional limits. Venue is accordingly invoked pursuant to the dictates of 28 U.S.C. § 1391(b) and (c).

IV. PARTIES

6. Plaintiff Jeffrey J. Heffernan (hereinafter "Plaintiff") is an adult individual citizen of the State of New Jersey, residing therein at 1 Emmanuel Avenue, Wayne, New Jersey 07470.

7. Defendant City of Paterson is a municipal corporation within the State of New Jersey located at 155 Market Street, Paterson, New Jersey 07505.

8. Defendant Mayor Jose Torres is, and was at all times material hereto, the Mayor of the City of Paterson, a municipal corporation within the State of New Jersey located at 155 Market Street, Paterson, New Jersey 07505. Mayor Torres is sued individually and in his official capacity.

9. Defendant Police Chief James Wittig is, and was at all times material hereto, the Chief of the City of Paterson Police Department, located at 111 W. Broadway, Paterson, New Jersey 07522. Chief Wittig is sued individually and in his official capacity.

10. Defendant Police Director Michael Walker is, and was at all times material hereto the Director of the City of Paterson Police Department, located at 111 W. Broadway, Paterson, New Jersey 07522. Director Walker is sued individually and in his official capacity.

V. FACTS

11. Plaintiff was hired as a police officer with the City of Paterson Police Department on or about November 11, 1985.

12. In or about 1996, Plaintiff was assigned to the Communications Division.

13. On or about December 18, 2005, Plaintiff was promoted to Detective. He was thereafter assigned to the Chief's Office.

14. In 2006, Lawrence Spagnola was running for Mayor of the City of Paterson against incumbent Defendant Mayor Jose Torres.

15. Plaintiff and his family had a close personal relationship with Spagnola.

16. Plaintiff is not, and was not at any time material hereto, a resident of the City of Paterson. As

such, Plaintiff was not eligible to vote in the 2006 Paterson mayoral election.

17 On April 13, 2006, Plaintiff, while off-duty, went to visit his mother, a resident of Paterson.

18. Plaintiff's mother supported Spagnola for mayor and had a sign in her front lawn which supported Spagnola's candidacy.

19. On April 13, 2006, Plaintiff's mother stated to Plaintiff that she wished to have a larger sign supporting Spagnola for her lawn and asked Plaintiff to assist her in obtaining one.

20. In response, Plaintiff went to obtain such a sign from Paterson City Councilman Alson [sic] Goew [sic].

21. At approximately 2:00 p.m. on April 13, 2006, Plaintiff, along with his son, were parked in Plaintiff's vehicle at the corner of Union and Berkshire Avenues in Paterson, waiting for City Councilman Alson [sic] Goew [sic] to arrive to deliver Plaintiff a sign supporting Spagnola's candidacy.

22. At that time, Paterson Police Officer Arsinio [sic] Sanchez, then on-duty, arrived on scene.

23. Sanchez spoke briefly with Councilman Goew [sic], who had also arrived.

24. Councilman Goew [sic] then approached Plaintiff's vehicle and advised Plaintiff that Officer Sanchez had contacted Defendant Chief Wittig and advised same that Plaintiff was with Councilman Goew [sic].

25. On April 13, 2006, Paterson Police Officer John Maes advised Plaintiff during a telephone conversation that Maes had been informed that Plaintiff was putting up signs supporting Spagnola and that "they are all pissed off" and "hell is going to break loose over this."

26. On April 14, 2006, Plaintiff was demoted to the Traffic Division Walking Squad, effective April 17, 2006.

27 In the Paterson Police Department, a transfer to the Traffic Division Walking Squad is used as punishment.

28. That day, April 14, 2006, Plaintiff went to the Chief's Office to collect his personal belongings. While there, Lieutenant Patrick Papagni and Deputy Chief William Fraher advised Plaintiff that he was not being transferred because of his job performance, rather, he was being transferred because of his political affiliation to Spagnola.

29. At this time, Plaintiff was further advised by Lieutenant Papagni and Deputy Chief Fraher that Defendant Mayor Torres had instructed Defendant Chief Wittig to transfer Plaintiff.

30. It was subsequently confirmed to Plaintiff by City of Paterson Business Administrator Eli Burgos that Plaintiff's demotion was indeed political and it was ordered by Defendant Mayor Torres.

31. Plaintiff was demoted in direct retaliation for his exercise of protected activities.

32. On or about May 26, 2006, City of Paterson Police Officer Wayne Smith instituted a civil action

against Defendants City of Paterson and Paterson Police Chief James Wittig, in the United States District Court for the District of New Jersey, *Wayne Smith v. City of Paterson, et al.*, Civil Action No. 06-2409. This suit alleged violations of 42 U.S.C. § 1983 in connection with Defendants' flawed 911 operating system and untrained 911 dispatchers, Smith alleged, caused the death of Smith's son.

33. Plaintiff was assigned to the Communications Division, which includes the 911 system, at all times material to the aforementioned lawsuit.

34. In connection with same, Plaintiff was questioned by attorneys for Defendants on or about July 20, 2006.

35. In response to questioning, Plaintiff stated, among other things, that Defendants' 911 system was seriously flawed, that many 911 dispatchers were not adequately trained, that despite the efforts of Plaintiff and others, the City failed to adequately train the 911 dispatchers and that, despite numerous complaints by Plaintiff and others, the City failed to take any steps to fix the flawed 911 system. Plaintiff further stated at this time that he believed Wayne Smith had legitimate claims.

36. In direct retaliation therefore, on or about August 3, 2006, Police Sergeants John Russo and Kelly Hemming, and Lieutenant Dave Rivello, came to Plaintiff's home and confiscated Plaintiff's department-issued firearm and his personal firearms.

37 There was no legitimate basis whatsoever for Defendants to take this action.

38. Plaintiff had not been declared unfit for duty and/or a danger to himself or others by any physician, Plaintiff had not been the subject of any department internal affairs investigation or report, and no written directive had been issued by the Chief or any other Defendant personnel calling for Plaintiff's weapons to be seized.

COUNT I
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATIONS

39. Plaintiff incorporates by this reference herein as though recited verbatim at length the allegations contained in paragraphs 1 through 38 above.

40. Defendants violated the provisions of 42 U.S.C. § 1983, in that Defendants, acting under color of State law, deprived Plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech.

41. Defendants intentionally, wilfully, and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment right to free speech.

42. Defendants' actions were to penalize and retaliate against Plaintiff for his exercise of fundamental First Amendment rights.

WHEREFORE, Plaintiff, Jeffrey J. Heffernan, respectfully requests this Honorable Court:

1. Enter a declaratory judgment that Defendants' retaliatory acts complained of herein have violated and continue to violate the rights of Plaintiff as secured by the United States Constitution;

2. Enjoin Defendants from continuing its retaliatory practices;

3. Award Plaintiff compensatory damages including but not limited to: pain, suffering, past economic loss, future economic loss, back pay, front pay, wage increases, loss of life's pleasures, loss of reputation, benefits, emotional distress and other damages;

4. Award reasonable costs and attorney's fees;

5. Aware [sic] punitive damages; and

6. Grant any other relief this Court deems just and proper under the circumstances.

COUNT II
VIOLATION OF THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT
N.J.S.A. 34:19-1 *et. seq.*

43. Plaintiff incorporates by this reference herein as though recited verbatim at length the allegations contained in paragraphs 1 through 42 above.

44. Plaintiff spoke out against and reported the poor state of Defendants' 911 operating system and

the fact that Defendant 911 dispatchers were not adequately trained.

45. Defendants retaliated against Plaintiff directly therefore.

46. Defendants' actions violate the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et. seq.*

47 As a direct and proximate result of Defendants' actions, Plaintiff has, and will in the future, suffer pain, emotional distress, humiliation, embarrassment, inconvenience, loss of pleasure and enjoyment of life, loss of reputation, lost wages, lost wage earning capacity, loss of benefits, and past and future medical expenses.

WHEREFORE, Plaintiff, Jeffrey J. Heffernan, respectfully requests this Honorable Court:

1. Enter a declaratory judgment that Defendants' retaliatory acts complained of herein have violated and continue to violate the rights of Plaintiff as secured by the United States Constitution;

2. Enjoin Defendants from continuing its retaliatory practices;

3. Award Plaintiff compensatory damages including but not limited to: pain, suffering, past economic loss, future economic loss, back pay, front pay, wage increases, loss of life's pleasures, loss of reputation, benefits, emotional distress and other damages;

4. Award reasonable costs and attorney's fees;

5. Aware [sic] punitive damages; and

6. Grant any other relief this Court deems just and proper under the circumstances.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

FROST & ZEFF

BY: *s/ Gregg. L. Zeff*
GREGG L. ZEFF, ESQUIRE
MICHAEL C. KSIAZEK, ESQUIRE
Attorneys for Plaintiffs

DATED: August 17, 2006

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Attorneys for Defendants,
the City of Paterson, Mayor Jose Torres,
Police Chief James Wittig, and
Police Director Michael Walker.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN Plaintiff, v. CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER, Defendants.	Docket No.: 06-CV-03882 Civil Action **ANSWER WITH AFFIRMATIVE DEFENSES, DEMAND FOR JURY TRIAL, DESIGNATION OF TRIAL COUNSEL, AND CERTIFICATION** (Filed Nov. 28, 2006)

Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, answer the Complaint of Plaintiff, insofar as it relates to such defendants as follows:

I. INTRODUCTION

1. Defendants deny the allegations in paragraph 1 of the Complaint.

II. JURISDICTION

2. Defendants deny the allegations in paragraph 2 of the Complaint.

3. Defendants deny the allegations in paragraph 3 of the Complaint.

4. Defendants deny the allegations in paragraph 4 of the Complaint.

III. VENUE

5. Defendants lack sufficient knowledge to form a belief as to the allegation set forth in Paragraph 5. Therefore, Defendants deny these allegations and demand proof thereof.

IV. PARTIES

6. Defendants do not admit or deny the statements in paragraph 6 of the Complaint because they make no allegations against these defendants.

7 Defendants admit the allegations in paragraph 7 of the Complaint.

8. Defendants admit the allegations in paragraph 8 of the Complaint.

9. Defendants admit the allegations in paragraph 9 of the Complaint.

10. Defendants admit the allegations in paragraph 10 of the Complaint.

V. FACTS

11. Defendants admit the allegations in paragraph 11 of the Complaint.

12. Defendants admit the allegations in paragraph 12 of the Complaint.

13. Defendants admit the allegations in paragraph 13 of the Complaint.

14. Defendants admit the allegations in paragraph 14 of the Complaint.

15. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 15 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

16. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 16 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

17 Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 18 of the Complaint. Therefore,

Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

18. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 18 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

19. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 19 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

20. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 20 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

21. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 21 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

22. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 22 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

23. Defendants lack sufficient knowledge or information to form a belief as to the truth of the

allegations of paragraph 23 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

24. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 24 of the Complaint. Therefore, Defendants deny these allegations and, as such Plaintiff is left to his proofs.

25. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 25 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

26. Defendants deny the allegations in paragraph 26 of the Complaint.

27 Defendants deny the allegations in paragraph 27 of the Complaint.

28. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 28 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

29. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 29 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

30. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 30 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

31. Defendants deny the allegations in paragraph 31 of the Complaint.

32. The complaint filed in *Wayne Smith v. City of Paterson et al.*, Civil Action No. 06-2409 is a legal document and thus, speaks for itself.

33. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 33 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

34. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 34 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

35. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 35 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

36. Defendants deny the allegations in paragraph 36 of the Complaint.

37 Defendants deny the allegations in paragraph 37 of the Complaint.

38. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 38 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

COUNT I
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATIONS

39. Defendants repeat and re-allege their answers to each and every allegation contained in paragraphs 1 through 38 as if set forth at length herein.

40. Defendants deny the allegations of paragraph 40 of Count I of the Complaint.

41. Defendants deny the allegations of paragraph 41 of Count I of the Complaint.

42. Defendants deny the allegations of paragraph 42 of Count I of the Complaint.

WHEREFORE, Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, demand judgment dismissing plaintiff's Complaint, with prejudice, together with costs of suit and such other relief as the Court deems equitable and just.

COUNT II
VIOLATION OF THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT
N.J.S.A. 34:19-1, *et seq.*

43. Defendants repeat and re-allege their answers to each and every allegation contained in paragraphs 1 through 42 as if set forth at length herein.

44. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 44 of Count II of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

45. Defendants deny the allegations of paragraph 45 of Count II of the Complaint.

46. Defendants deny the allegations of paragraph 46 of Count II of the Complaint.

47. Defendants deny the allegations of paragraph 47 of Count II of the Complaint.

WHEREFORE, Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, demand judgment dismissing plaintiff's Complaint, with prejudice, together with costs of suit and such other relief as the Court deems equitable and just.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

The Plaintiff has failed to join all necessary parties for a proper adjudication of the within matter.

THIRD SEPARATE DEFENSE

Defendants have not deprived the Plaintiff of any constitutionally protected property or liberty interest or any other rights or privileges, guaranteed to Plaintiff.

FOURTH SEPARATE DEFENSE

In the event any action of Defendants deprived or caused a deprivation of Plaintiff's federally protected rights (which defendants deny), then, and in any event, all such actions of the Defendants were taken in good faith and without any fraud or malice and with a reasonable belief that such actions were lawful.

FIFTH SEPARATE DEFENSE

Defendants did not, and were not reasonably expected to know that any actions taken with respect to the Plaintiff were in violation of plaintiff's rights.

SIXTH SEPARATE DEFENSE

If Plaintiff sustained any damages, which Defendants deny, the damages were caused by Plaintiff's sole negligence or by persons over whom defendants had no control.

SEVENTH SEPARATE DEFENSE

Plaintiff fails to allege any claims against Mayor Jose Torres, Chief James Wittig, or Director Michael Walker.

EIGHTH SEPARATE DEFENSE

Any alleged actors that are agents of a municipality, an instrumentality of the State of New Jersey and, at all times relevant hereto, their actions were taken pursuant to lawful authority vested unto them, and all such acts so performed were a reasonable and appropriate exercise of discretion based upon the information available to them.

NINTH SEPARATE DEFENSE

The Complaint is frivolous and without merit as to the answering Defendants and should be stricken on this basis.

TENTH SEPARATE DEFENSE

Plaintiff is not entitled to punitive damages against these Defendants and as such, these claims are barred by state and federal law.

ELEVENTH SEPARATE DEFENSE

Defendants deny any breach of duty to Plaintiff.

TWELFTH SEPARATE DEFENSE

The intentional conduct of Plaintiff is the direct and proximate cause of his damages, if any.

THIRTEENTH SEPARATE DEFENSE

This claim is barred by the doctrine of unclean hands.

FOURTEENTH SEPARATE DEFENSE

All of the acts of these Defendants were performed in good faith and, therefore, these Defendants are entitled to qualified immunity.

FIFTEENTH SEPARATE DEFENSE

These Defendants have no custom, plan, or practice to violate the rights of this employee and, therefore, the Complaint should be dismissed.

SIXTEENTH SEPARATE DEFENSE

These Defendants deny having acted in a palpably unreasonable manner.

SEVENTEENTH SEPARATE DEFENSE

Plaintiff's allegations fail to meet the statutory requirements of N.J.S.A. 34:19-1 et seq., and therefore should be dismissed.

EIGHTEENTH SEPARATE DEFENSE

These Defendants have not violated the United States Constitution or the New Jersey State Statutes in any way to deprive Plaintiff of his rights.

NINETEENTH SEPARATE DEFENSE

This action has been commenced by Plaintiff in bad faith and with the intent to harass these Defendants and cost great sums of money to defend the cause of action and, therefore, these Defendants will seek reimbursement for attorney fees and costs pursuant to 42 *U.S.C.* Section 1988 and *N.J.S.A.* 2A:15-591.

TWENTIETH SEPARATE DEFENSE

These Defendants incorporate by reference each and every defense of every co-defendant, named or unnamed, as if set forth at length herein.

TWENTY-FIRST SEPARATE DEFENSE

The Plaintiff's claims are generalized and conclusory and Defendants cannot fully anticipate all the affirmative defenses that may be asserted in the within action. Accordingly, these Defendants reserve the right to interpose such other and further defenses as continuing investigation and discovery may reveal.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
Attorneys for Defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

Dated:
November 28, 2006

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that the defendants hereby demand a trial by jury of all issues so triable.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Attorneys for defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

Dated: November 28, 2006

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that Alberto Rivas, Esq. is hereby designated trial counsel in this matter.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Attorneys for defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

Dated: November 28, 2006

CERTIFICATION

Pursuant to Local Civil Rule 11.2, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other Court or a pending arbitration proceeding to the best of my knowledge and belief. Plaintiff refers to *Wayne Smith v. City of Paterson, et al.* Civil Action No, 06-2409 in his complaint, but this matter in controversy is not the subject matter of that action.

Respectfully submitted,

THE CITY OF PATTERSON [sic], MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER

By their attorneys,

Dated:
November 28, 2006

/s/ Alberto Rivas

Alberto Rivas, Esq.
Victor A. Afanador, Esq.
LITE DEPALMA GREENBERG & RIVAS, LLC
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
Tel: (973) 623-3000
Facsimile: (973) 623-0211

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 06-CV-03882

JEFFREY HEFFERNAN,

Plaintiff,

vs.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER,

Defendants.

DEPOSITION OF:
JEFFREY HEFFERNAN

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before CYNTHIA A. TEPE, a Certified Court Reporter and Notary Public of the State of New Jersey, held at the offices of LITE, DE PALMA, GREENBERG & RIVAS, LLC., Two Gateway Center, 12th Floor, Newark, New Jersey, on Friday, August 17, 2007, commencing at 10:50 in the morning.

* * *

[53] Q. And what was the retaliatory action that was taken against you?

A. I was demoted, I was punitively placed into the traffic, squad walking, I was denied overtime as per the contract states seniority dictates overtime. I

was denied two assignments to overtime while I was on traffic because the mayor didn't want me there and said, he's not going to work an assignment. So they told me I couldn't show up for the overtime.

Q. How do you know that Mayor Torres was involved in this retaliatory action against you?

A. I was told so.

Q. Who told you this?

A. Lieutenant Papagni and Deputy Chief Fraher.

Q. Now, do you remember when they told you this?

[54] A. They told me April 14th at about 2:00 p.m.

Q. April 14th?

A. Yes.

Q. 2006?

A. Yup.

Q. And what did they specifically say to you, if you recall?

A. Their exact words for me, when I asked why I was being demoted and being transferred, were, you are politically affiliated with Lawrence Spagnola and you can no longer work in this office.

Q. Just so the record is clear, let's go back, because while I understand what happened and you do, the record may not be clear.

What do you specifically mean by being politically affiliated with Larry Spagnola?

A. They said to me because I was placing á sign for my – actually getting a sign for my mother, that I could no longer work in this office because I was politically affiliated with Lawrence Spagnola and his bid to become mayor of the City of Paterson.

Q. Against the current mayor, Jose Torres?

A. Correct.

* * *

[55] Q. Other than the incident that you've referenced in your complaint about getting a sign [56] for your mother, did you do anything else to outwardly support Larry Spagnola in his bid for mayor?

A. No.

Q. Were you working on his campaign?

A. No.

Q. During the time that he was running for this position, did you have conversations with Larry Spagnola?

A. Absolutely.

Q. How often would you speak to him?

A. I spoke to him once or twice, three times a week.

Q. Is he a close personal friend of yours?

A. Yes, he is.

* * *

[59] Q. Turn to Paragraph 17 in your complaint?

A. Paragraph 17?

Q. Paragraph 17, Page 4. What I'd like you to read is – actually read Paragraph 16 through to the next page, to 26.

A. (Reading).

Q. Done?

A. Yes

Q. Your mother already had a sign on her front lawn prior to April 13th correct?

A. Correct.

Q. And she wanted a bigger sign; is that right?

A. Correct.

Q. Where did you get the sign from?

A. Alson [sic] Goew [sic].

Q. And did you call Councilman Goew [sic] to bring you a sign?

A. No.

Q. How did he come to bring you a sign?

A. I went to him.

Q. And where was he?

A. He was up on Union Ave.

Q. Now did you know he was going to be there?

[60] A. Yes.

Q. Hove did you know he was there?

A. I called Officer Jimmy Durkin, who was making the signs at his house.

Q. Was Jimmy Durkin off duty?

A. Yes.

Q. So Jimmy Durkin was working for the Spagnola campaign?

A. I don't know what he was doing, but I know he was making the signs for him.

Q. Okay. So you called Jimmy Durkin, and what happened?

A. I said to him, Do you have any signs? And he said, No. He goes, But I just gave a whole ton of them to Al Goew [sic]. I go, Well, that doesn't help me. I said. Where is he? He goes, He's over on Union Avenue. I said, Union and what? I think he said Union and Berkshire. He's putting them up. Go over there,

grab him, tell him what you want; this way, it saves him trouble to putting the thing up on the east side at your mother's office.

Q. Were you on duty?

A. I was on vacation. I was off duty.

Q. Where were you living on April 13, 2006; in Wayne?

[61] A. Yes.

Q. And were you visiting your mother?

A. Yes.

Q. You weren't working on the campaign that day?

A. I wasn't working on the campaign, period.

MR. FROST: Objection to the form. I don't think he ever testified he was working on the campaign at all.

A. I wasn't.

* * *

Q. And there came a time where you met Councilman Goew [sic] that day, correct?

A. Yes.

Q. And did he have signs?

A. Yes.

Q. And what did you do?

A. I asked him for a sign.

Q. And what happened after that?

A. He said to me, Hold up, I have to – he [62] had huge signs in his truck. I didn't need one that big; it wouldn't even fit in my car. So he said, I have two more to put up, you can have the third sign now. Just sit here and wait. I said okay, and I did.

Q. What happened? Did someone else see you there?

A. Arsinio [sic] Sanchez, who is a motorcycle officer and the mayor's best friend, and bodyguard, drove by and gave a wave. Hey, what's up, buddy. And he pulled over and he spoke to Alson [sic] Goew [sic], and then I proceeded to see Mr. Sanchez go onto his cell phone, and Mr. Goew [sic] came back over to my vehicle and said to me, Don't you work in the chief's office, and I said, Yeah. He says, Well, you'd better get out of here, he says, because you know they hate me and Sanchez is either on the phone with the mayor or the chief. He says, You're up here putting signs up and you're going to have a problem. And I said, I have no problem, I'm not working, number one. And, number two, nobody tells me who I can talk to and who I can't talk to. I got my sign, and I went to my mother's house, dropped it off. I didn't even put it up. Just dropped it off, because I didn't have any tools [63] with me, and I went home. I had my son with me in the car.

* * *

Q. Have you ever heard from anyone else who Arsinio [sic] Sanchez was on the phone with?

A. Yes.

Q. Who?

A. Lieutenant Papagni.

Q. And how did you find that out?

A. Lieutenant Papagni told me so.

Q. When?

A. The day of April 14th in the office.

Q. The same day he told you you were politically affiliated?

A. Correct.

* * *

[66] Q. Did you think about calling Papagni or anyone else?

A. No, absolutely not, because they don't like Spagnola, I knew that, and I said if the bomb is going to drop, drop it.

Q. You said they don't like you. Who is [67] "they"?

A. Chief Witting [sic] don't like Spagnola. Chief Papagni and Deputy Chief Fraher did not like Spagnola. They made it clear to me on several occasions while I worked in that office how they disliked

him for numerous reasons and that I was crazier for being his friend.

Q. Because they all knew you were friends with him?

A. Absolutely.

* * *

[132] Q. Tell me in your own words how your first amendment violations were violated.

A. Well, I feel that I was retaliated against, I was demoted, I was harassed, I was threatened, continued to be because of my affiliation with Larry Spagnola. I lost money, I'm sick, I continue to get worse, sick with my stomach conditions. Now I have colitis on top of everything else because of the nerves and the worry, all because of a friendship with a man that I've had for 25 years.

Q. What I'd like to do is, in a little bit, we're going to close out with your damages, in which I'm going to ask you about the money you lost, and your physical ailments, but I just want to ask a little more follow-up questions on the first amendment violations and your SEPA [sic] claims, as well.

A. Okay.

Q. And the first amendment violation that you're particularly relying upon is the right to post a sign of someone that you were supporting for [133] mayor, correct?

A. I wasn't supporting him for mayor.

Q. I apologize. Let me rephrase that. That your mother was supporting for mayor?

A. Yes.

Q. Now, you couldn't vote for Larry Spagnola could you?

A. No.

Q. Because you weren't a resident of the City of Paterson?

A. Correct.

Q. But you were, in fact, going to post a sign on your mother's lawn?

A. No. I was going to pick it up and bring it to her. I wasn't going to post it. I didn't have tools with me. My older brother can take care of that.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 06-CV 03882

JEFFREY HEFFERNAN,

Plaintiff,

vs.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER,

Defendants.

Deposition of:
JAMES WITTING [sic]

TRANSCRIPT of testimony as taken by and before ALLYSON MICHELLE CACIOLI, a Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of LITE, DePALMA, GREENBERG & RIVAS, Two Gateway Center, 12th Floor, Newark, New Jersey 07102, on Wednesday, August 22, 2007, commencing at 11:50 a.m. in the morning.

* * *

[73] Q. And why was he transferred?

A. For the good of the department.

Q. Who gave the order to transfer him?

A. I did.

Q. Why did you feel it was necessary to transfer him "for the good of the department"?

A. Because of Jeffrey's overtly involvement in a political election, which was taking place in the city.

Q. What election was that?

A. The election for mayor.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 06-CV 03882

JEFFREY HEFFERNAN,
Plaintiff,
v.
CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic] and POLICE DIRECTOR MICHAEL WALKER,
Defendants.

DEPOSITION UNDER ORAL EXAMINATION OF
ASLON GOOW, SR.
Paterson, New Jersey
January 9, 2008

* * *

[16] Q. Okay.

A. So while we were there, you know, we were concerned that if someone, somebody saw any police-officers helping me specifically in this campaign, that they would be targeted.

Q. And why would you feel that?

A. Because that's the political climate around here. Certain people feel that you should be loyal to a certain party. If you are a police-officer you should be with whomever is with, you know, the police department. Or if you're a fireman, they would hope that you were with whoever the majority of the firemen were with.

But that wasn't the case here. The police department was pretty divided. The firemen also divided. Everybody had their choice of who they wanted to support. But there are political ramifications. And it was clearly evident to me that had anybody seen Jeff Heffernan out there with us it would have looked like he was putting up the signs.

Q. But was he putting up any signs?

A. No.

Q. Okay.

A. At that moment I had told him, I [17] said, Jeff, I think it's better that, you know, I give you the sign later or you come back later, I said, because if somebody comes by and sees you out here were going to have problems.

And no sooner than I said that Officer Sanchez pulled up on his motorcycle.

* * *

[18] I know firsthand that Arsenio Sanchez was supporting our present mayor at the time.

So with that in mind, Officer Sanchez just pulled away on his motorcycle and I immediately picked up my cell phone and I called Officer Sanchez, and he responded back to me. And I asked him, I said, you know, how are you doing. He said, I'm doing good. I said, why did you drive by like that? I said, why didn't you stop and say hello. He says, he goes, oh, it didn't look like you wanted to say hello to me. I said, well, why don't you come back.

So he came back. He wasn't far. He was just going down the road. So he came back to the scene. And I said to him, I made it very clear and blunt to him, I said, listen, Arsenio, I said, I'm a big supporter of Larry Spagnola. I'm his campaign manager. I said, you're a big supporter of Mayor Torres. I said, let's not let our personalties [sic] be a conflict here. You can support whoever you want and we can support whoever we want and let's leave it at that. Because in the end somebody is going to win and we don't want to have any political ramifications come out of this.

* * *

72 Churchill Rd.
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tel 201-568-6610
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simring@aol.com

STEVEN S. SIMRING
MD, MPH

January 7, 2009

Victor A. Afanador, Esq.
Lite, DePalma, Greenberg, and Rivas, LLC
Attorneys at Law
2 Gateway Center, 12th Floor
Newark, New Jersey 07102

Re: Jeffrey J. Heffernan

Dear Mr. Afanador,

At your request, I have examined Officer Jeffrey J. Heffernan at my office on 12/09/08. The session lasted 3.5 hours. The purpose of this evaluation was to assess this patient's claims of emotional damages related to his employment. I have also reviewed the following background material:

1. Medical reports
   (a) Philip Bai, MD (psychiatrist), 6/28/06, 7/24/06, 8/31/06, 10/09/06, 1/30/07, with office notes, 6/06-9/08
   (b) William B. Head, Jr., MD (psychiatrist), 9/06/06, 3/22/07, 3/23/07
   (c) Bertram T. Rotman, PhD (clinical psychologist), 1/31/02
2. Paterson Police Department employment records, 1985-2007

3. Plaintiff's answers to interrogatories, 3/09/07

4. Deposition of Jeffrey Heffernan, 8/17/07

* * *

He was brought to my office by his brother-in-law, who waited outside. He understood that I was a psychiatrist retained by the defense in his civil lawsuit against his employer. He understood the limits of confidentiality in a forensic evaluation.

* * *

Mr. Heffernan believes that his problems with the Paterson Police Department began with a minor incident on 4/10/06. He explained to me that former Chief Larry Spagnola was running for mayor against incumbent mayor Jose Torres. Mr. Spagnola was an old friend of his mother, but Mr. Heffernan insisted that he took no position in the election. He told me that he picked up a Spagnola lawn sign only because his mother asked him to do so. He believes that the mayor's close associate Arsenio Sanchez saw him with Councilman Alson [sic] Goew [sic] when he was carrying the sign.

* * *

He tried to explain that he was only delivering a sign, and that he had taken no position in the election. He told me that none of his explanations were accepted, because his behavior with the sign was interpreted as an indication of disloyalty.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN,	**CIVIL ACTION**
Plaintiff,	**NO. 06-3882 (PGS)**
v.	
CITY OF PATERSON, et al.,	
Defendants.	

PLAINTIFF JEFFREY J. HEFFERNAN'S MOTION FOR THIS COURT TO FIND AS A MATTER OF LAW THAT THE PLAINTIFF ENGAGED IN PROTECTED SPEECH

(Filed Jan. 26, 2009)

Plaintiff, Jeffrey Heffernan, by and through his undersigned counsel, respectfully moves the Court to find as a matter of law that the Plaintiff engaged in protected speech. Plaintiff further requests that at trial the Judge instruct the jury, at the appropriate time, that Plaintiff's political activity of picking up a campaign sign is a protected activity as a matter of law and the Court has decided that Plaintiff engaged in First Amendment Activity. Additionally, Plaintiff requests that the verdict slip and jury instructions reflect this finding.

* * *

II. PLAINTIFF'S SPEECH IS PROTECTED BY THE FIRST AMENDMENT

* * *

C. Freedom of Association.

Plaintiff's family has long been friends with the Spagnola family. Plaintiff drove into Paterson to collect a yard sign supporting Lawrence Spagnola, the former Chief of Police in Paterson, in the May 2006 mayoral election. Plaintiff was with his son and not in uniform when he met with Paterson City Councilman Aslon Goow in the City of Patterson [sic], where Goow was delivering campaign signs to Spagnola supporters. Goow was Spagnola's mayoral campaign manager. (Deposition of Goow at 18). Plaintiff had the right the associate with whoever he wanted to while off duty. See *Perez v. Cucci*, 725 F. Supp. 209 (3d Cir. 1989).

The first and fourteenth amendments also protect an individual's right to exercise freedom to associate with others for the common advancement of political beliefs and ideas. *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973). See also *Lyng v. International Union*, UAW, 485 U.S. 360, 108 S. Ct. 1184, 1190 n.5, 99 L. Ed. 2d 380 (1988) (reviewing decisions in which the Court held that individual associational rights must be free from governmental interference). The right to associate with the political party of one's choice and support its platforms and candidates is an integral part of this basic constitutional freedom. *Kusper*, 414 U.S. at 57

* * *

III. CONCLUSION

In light of the foregoing, Plaintiff, Jeffrey Heffernan, by and through their undersigned counsel, respectfully moves the Court to find as a matter of law that the Plaintiff engaged in protected speech.

Respectfully Submitted,

s/ Mark B. Frost, Esquire
FROST & ZEFF
7 North Columbus Boulevard
Philadelphia, PA 19106-1492
T: 215-351-3333
F: 215-351-3332

FROST & ZEFF
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(215) 351-3333
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN,	:	**CIVIL ACTION**
Plaintiff,	:	**NO. 06-3882 (PGS)**
v.	:	
CITY OF PATERSON, et al.,	:	
Defendants.	:	

PLAINTIFF JEFFREY HEFFERNAN'S TRIAL BRIEF

(Filed Feb. 9, 2009)

* * *

B. Freedom of Association.

Plaintiff's family has long been friends with the Spagnola family. Plaintiff drove into Paterson to collect a yard sign supporting Lawrence Spagnola, the former Chief of Police in Paterson, in the May 2006 mayoral election. Plaintiff was with his son and not in uniform when he met with Paterson City Councilman Aslon Goow in the City of Patterson [sic], where Goow was delivering campaign signs to Spagnola supporters. Goow was Spagnola's mayoral campaign manager. (Deposition of Goow at 18). Plaintiff

had the right the [sic] associate with whoever he wanted to while off duty. See *Perez v. Cucci*, 725 F. Supp. 209 (3d Cir. 1989). (See Plaintiff's Motion for this Court to Find as a Matter of Law that Plaintiff Engaged in Protected Speech, attached hereto as Exhibit "A").

* * *

D. Plaintiff's Protected Conduct Was a Substantial and Motivating Factor in His Disciplinary Action.

The third prong requires a showing that Plaintiff's protected speech was a substantial or motivating factor in his retaliatory transfer. *Mt. Healthy School District Board of Educ. v. Doyle*, 429 U.S. 274 (2000), *Howard v. Board of Educ. of the City of East Orange*, 90 Fed. Appx. 571 (3d Cir. 2003).

* * *

III. CONCLUSION

In light of the foregoing, Defendants violated the provisions of 42 U.S.C. § 1983, in that Defendants, acting under color of State law, deprived Plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech by demoting him in direct retaliation for his exercise of protected activities.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, vs. CITY OF PATERSON, et als., Defendants.	OPINION

Trenton, New Jersey
Friday, April 3, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.

APPEARANCES:

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record taken stenographically in the above entitled proceedings.

* * *

[3] On the afternoon of August 14th, plaintiff went to the chief's office to collect his personal belongings and at that point Papagni and Deputy Chief Fraher, advised Heffernan that he "was not being transferred because of his job performance but he was being transferred because of his political affiliations."

That's more like association rights as opposed to a speech right. Chief Wittig stated I guess around the same time that he transferred plaintiff to traffic because of his "overtly involvement in the political election." Again that seems like association as opposed to a comment about police officer Heffernan's speech.

* * *

[4] So based on the law of the 1st Amendment, especially dealing with the right of association, I find that the plaintiff meets the burden to file and to pursue a 1983 action under that provision.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN
Plaintiff,
-vs-
CITY OF PATERSON, et als.,
Defendants.

VOLUME 1

Trenton, New Jersey
Monday, April 6, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

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* * *

[1.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

PATRICK GRECO
By Mr. Frost: 1.3

---

* * *

[1.3] PATRICK GRECO, having been duly sworn, testifies as follows:

* * *

[1.6] Q Now, Sergeant Greco, did you happen to hear a conversation that took place on April 13th involving Lieutenant Papagni?

[Objection Omitted]

THE WITNESS: Yes.

* * *

Did you hear a conversation involving Lieutenant Papagni while you were in the office on the 13th?

[Objection Omitted]

[1.7] A Yes.

* * *

Q After you heard that portion of the conversation, what did you eventually ask Lieutenant Papagni?

A What had happened.

* * *

[1.8] Q Prior to asking Lieutenant Papagni, can you tell us what you heard in that conversation?

A I heard Lieutenant Papagni become upset and loud during the phone conversation.

[Objection Omitted]

A During that, he said, "He did what," in a loud boisterous fashion. That's all I really could hear in a clear version.

Q And did you speak to Lieutenant Papagni after the conversation?

A Not immediately after.

Q Shortly thereafter, did you speak to him?

A Yes.

Q And what did you say to him?

A "What had happened? What happened?"

Q Did he tell you what happened?

A Yes.

Q What did he tell you?

A He told me that he had received a call from the mayor in regards to Jeffrey Hefferman [sic].

[1.9] Q And did he say anything else?

A That Jeff had been seen with putting up a sign, with a political sign, and that I think Arsenio had seen him with the sign.

Q Arsenio is who?

A I'm sorry. He's, actually I think he was a detective at the time. Detective Arsenio Sanchez. He's assigned to the mayor's office. He had called the mayor, told him that he saw Jeff with the sign and I think Jeff was putting it at his mother's house. That's why the mayor was upset. The mayor was very upset about it and he called Lieutenant Papagni.

[Objection Omitted]

Q Now, did Lieutenant Papagni say anything as to what was going to happen to Officer Heffernan as a result of being involved in picking up this campaign sign?

A He had mentioned that the mayor had said – being upset, that he wanted him disciplined and moved immediately.

Q Okay. Did you know whether, in fact, Officer Heffernan was transferred and moved immediately from the chief's office?

A It wasn't at that very moment. It did occur though.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 2

Trenton, New Jersey
Tuesday, April 7, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

Appearances:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

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* * *

[2.2] INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
ARSENIO SANCHEZ:				
By Mr. Frost:	2.8		2.41	
By Mr. Afanador:		2.38		
PATRICK GRECCO				
By Mr. Frost:	2.45		2.88	
By Mr. Lisbona:		2.61		2.92
ASLON GOOW				
By Mr. Frost:	2.101		2.144	
By Mr. Afanador:		2.126		
RAYMOND HEFFERNAN				
By Mr. Frost:	2.147		2.167	
By Mr. Lisbona:		2.158		

* * *

[2.5] THE COURT: Let me see what else is there.

I had the issue from Mr. Afanador with regard to the surprise as this being an association case as opposed to a speech case. I do note one interesting issue and I didn't know – but there was a case last year Judge Simandle [sic]. Had by a police officer against a police chief. In that case, although it was an association case, the chief was demoted or did something to this officer because of his relationship with

the union. But at any rate, the judge charged it's as an affiliation case but throughout his opinion he talked about the speech parts of it so it was kind of a combination of both of them. I just want to let you know that. But at any rate, my view – and I read the Shultz versus Calli case and the Warner versus – 267 F.3d 288. The Warner case the problem was that there were insufficient facts disclosed prior to trial in a security transaction. We don't have that here. Discovery was [2.6] entirely complete. All parties had all the facts that were necessary for them to proceed. So, I don't see that the case is like the Warner case.

With regard to the Shultz v. Calli, that's an interesting case because it goes into a lot of different things and one of them was, the plaintiff pled jurisdiction incorrectly and somehow it came up during the trial I guess and then at the end of it, it became a huge issue if there was a federal case involved. At any rate, it was sent back down to the District Court to comply with its turn-around. But the truth of the matter was that there was insufficient pleadings and there was a hole in the case as to a number of facts and the pleading of them.

In this case, we don't have that either. We have a case where discovery was substantial. A number of people were deposed. There was a final pretrial order. The final pretrial order set up the issue with regard to association and speech. I got two motions on that

summary judgment from the defendant and a motion in limine, I think, it was from the plaintiff asking me to declare that there was a violation of the First Amendment and he put it in different terms, one on association and one on free speech. But both the parties knew the scope of the issue. Everybody had time to plead their cases and to put their defenses and the plaintiff putting forth his case with more than reasonable time.

[2.7] So, I don't see from the cases cited would be controlling in this case and I'm going to allow the case go forward as it is.

* * *

[2.104] ASLON GOOW, SR., having been duly sworn, testifies as follows:

* * *

[2.140] Q Isn't it true that Mr. Heffernan never participated during – in this Spagnola campaign for mayor?

A No, that's not true.

Q Didn't you indicate in your deposition transcript that he never supported the campaign other than just pick up a sign for his mother?

A I don't have the deposition in front of me. I might have said that. He was a supporter of Mr. Spagnola.

* * *

[2.150] RAYMOND HEFFERNAN, having been duly sworn, testifies as follows:

* * *

[2.150] Q Now, sir, what is your relationship to Officer Jeff Heffernan?

[2.151] A That's my brother.

Q Officer Heffernan, did you have an opportunity to go to the chief's office on Friday, April the 14th, 2006?

A Yes, I did.

Q How did that come about?

A My sister-in-law called me and told me my brother was called into the chief's office, and she was afraid something was wrong; asked me to go down there to see make sure everybody was okay.

Q About what time of day was that? Do you recall?

A I'm going to say maybe late morning, early afternoon.

Q Did you go down to the chief's office?

A Yes, I did.

Q When you arrived at the chief's office, can you tell me who was there?

A My brother was there. Lieutenant Papagni and Deputy Chief Fraher.

Q When you arrived, can you tell us what was going on?

A My brother and the lieutenant were in a heated debate almost argument.

Q Could you hear what the argument was about?

A Yes.

Q What was it about?

A Apparently, what I found out after the fact, Lieutenant Papagni was moving my brother from the chief's office because of him obtaining a sign for my mother's lawn.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 3

Trenton, New Jersey
Wednesday, April 8, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

Appearances:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

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* * *

[3.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

JEFFREY HEFFERNAN
By Mr. Frost: 3.30 3.174
By Mr. Afandor [sic]: 3.127

* * *

[3.30] JEFFREY HEFFERNAN, having been duly sworn, testifies as follows:

* * *

[3.38] Q Now, sir, did you have a past relationship with the former chief of the police, Laurence Spagnola?

A Yes, I did.

Q Can you tell me what that relationship was?

A Personal.

Q When you say, "personal," can you explain that?

A He's my mother's second cousin. All through my tenure with the police department, Laurence Spagnola and I met and where [sic] friends ever since all through his rankings.

Q And did you support his candidacy for mayor during the mayoral election in 2006?

A I wanted him to win.

* * *

Q Now, I want to draw your attention to April the 13th. Can you tell us where you went on that day?

[3.39] A I went to my mom's house.

* * *

Q Make any request of you that day?

A Yes. While I was there, she was complaining about a few things, and one of them was that somebody had stolen her Laurence Spagnola sign for mayor off the lawn. It was a small one. She asked me if I could reach out to Mr. Spagnola to see if I can –

[Objection Omitted]

Q Did you do that?

[3.40] A Yes. I placed a phone call to the person I knew who he was making the signs and asked them if he could, in fact, deliver a sign to her.

And he said it would be much easier if I could come up, meet Councilman Goow, who was putting signs up in the Hillcrest Section of town, pick it up and deliver it back to her house, it would help them out, and I agreed.

Q And did you pick up the sign?

A Yes, I did.

Q Where did you go to pick up the sign?

A I believe it was Union and Berkshire, one of those side streets up there, Union and something.

Q And who was with you that day?

A My son Jeffrey.

* * *

[3.42] Q Tell us what happened when you got to the area of Union, Berkshire and Maitland Avenue.

A I was met by Councilman Aslon Goow, who was up there putting signs on the neighbors' lawns. I asked him, Jimmy Dirkin (phonetic), the person I had originally called for the sign, said to met [sic] you up here, you have a sign for me for my mother's lawn.

He said, how big do you want the sign?

I explained to him it had to fit in a truck. I have a Ford Explorer.

He had three or four very large signs that would have fit in my truck. He said to me, stick around for a few minutes, I have two or three more neighbors I have to knock on their door if he could place those signs on their lawn. You could have the fourth sign, I believe it was.

I waited around. I picked up my sign.

Q Thank you.

Now, while you were there, did you have an opportunity to see any police officers?

A Yes, I did.

Q Who did you see?

A I saw Officer Arsenio Sanchez.

Q What was Arsenio Sanchez doing?

[3.43] A He was coming around the corner, one of the side streets, onto Union Avenue on his police motorcycle.

Q And did you have any conversation with him?

A I just gave him, you know, how you doing (indicating).

Q Now, do you know Officer Sanchez?

A Yes.

Q And do you know who he supported in the campaign?

A Absolutely. Mayor Torres.

Q How do you know that?

A He told me so.

* * *

Q Now, with respect to picking up the sign, did you pick up your sign?

A Yes, I did.

Q Where did you take it?

A Back to my mom's house.

* * *

[3.44] Q When you got to your mother's home, what did you do then?

A I put the sign in the backyard, and then my son and I, we helped her with a few personal items, because she's bedridden, you know, couple hours there, and then we left.

* * *

Q By the way, about what time of day did you go pick up the signs?

A Twoish, two o'clockish.

* * *

[3.45] Q Okay. Now, did you have an opportunity to call one of the officers that you worked with later that afternoon?

A Yes, I did.

[3.46] Q And what officer is that?

A Detective Johnny Maes.

* * *

Q With respect to your records there, can you show us what [3.47] time that was?

A 4:14 p.m.

* * *

Q Did you have any conversations with Detective Maes prior to 4:14 on the 13th?

A No.

Q When you called him, can you tell us what happened?

[Objection Omitted]

A. I spoke to John and, you know, asked: What are you doing? Blah, blah, blah.

THE COURT: Wait a second. You said "blah, blah, blah"?

A. That's how we started the conversation.

Q Say the crux of the conversation.

A I asked him if he wanted to go to Duffy's for a hamburger and a beer.

He said to me no, he wasn't working.

I said I thought you were working today.

He said no. He said: What are you doing?

I said: What do you mean? I heard you're putting up [3.48] signs for Spagnola.

I said: Who did you hear that from?

He says, it doesn't matter. I got a phone call from the chief's office. I don't want to tell you. That's what I heard.

I said: No. That's what I'm doing. I just came from my mother's house.

MR. AFANADOR: Objection to what Officer Maes may have heard. He can only testify as to his direct conversation with John Maes.

THE COURT: Why don't you just tell us what Maes said to you.

A That's exactly what he said. I know he received a phone call from the chief's office. The person in the chief's office relayed to him that I was putting signs up all over the city of Paterson for Larry Spagnola.

I said I had not been doing that. I was picking a sign up for my mother, and that's all I was doing.

He said: Well, I'm telling you all hell is breaking loose in the office, and you're out of the chief's office. He suggested to me that I may want to place a phone call to somebody of a higher authority and see if I can rectify the situation. Which I didn't.

* * *

[3.51] Q And when you went down to the chief's office, who did you intend to speak to?

A Lieutenant Papagni.

Q Why him as opposed to the chief or somebody else?

A Well, I asked for the chief of police. I was told I would not be granted access to him. And Lieutenant Papagni said: I'm here. You'll speak to me.

And the heated argument, he repeated why I was being transferred.

What did I do wrong? Was it a – I did something with my work performance? Something that I did that I don't know about, that I should know about?

I was told no. You were politically involved putting up signs. You can no longer work in this office. You are out.

Q This is conversation you had at the office, or is this still on the phone?

A This is at the office.

Q So you're at the office now having this conversation with Lieutenant Papagni?

A Correct.

Q And after he made those statements to you, what did you say?

A I said to him I wasn't politically involved. I was just [3.52] picking a sign up for my mom.

I says: I don't understand. What did I do wrong to deserve this?

He says: Listen, this is not from me. This is from the mayor. He says the mayor called the chief. The chief called me.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 5

Trenton, New Jersey
Friday, April 10, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

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* * *

[5.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

JAMES WITTIG
By Mr. Frost: 5.3

* * *

[5.3] JAMES WITTIG, having been duly sworn, testifies as follows:

* * *

[5.39] Q Before you made the transfer, you got the information that Jeff was out hanging political signs with Councilman Goow from Lieutenant Papagni. Is that correct?

[5.40] A Correct.

Q And you based your transfer on that information. Is that correct?

A Correct.

* * *

[5.48] Q So we've established that with respect to Officer Heffernan, he was not on duty. Is that right?

A Correct.

Q Wasn't wearing a uniform?

A Correct.

* * *

Q Now, can you tell me as a clerk in your office and being off duty that day, how it conflicted with his duties on that day?

A It was the perception that Jeffrey was involved in a political campaign.

Q I'm asking how it conflicted with his duties.

A Because Jeffrey was supposed to be perceived. He was in the Chief's office.

He was advised not to try – get involved with politics. Try to keep politics out of the office.

It was a thing of trust. Jeffrey betrayed my trust when he got involved. He gave me his word he wasn't involved in the political campaign. He was advised whatever happens in the [5.49] Chief's office is of a confidential nature, it stays within the Chief's office.

Just the perception what Jeffrey did indicated that he broke my trust. Jeffrey had to go.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 6

Trenton, New Jersey
Monday, April 13, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

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By Mr. Frost			6.129	
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By Mr. Frost	6.133			
By Mr. Afanador		6.158		
By Mr. Frost			6.166	
JEFFREY J. HEFFERNAN, II				
By Mr. Frost	6.168			
By Lisbona		6.174		
MARLENE HEFFERNAN				
By Mr. Frost	6.175			
By Mr. Lisbona		6.182		

* * *

[6.3] JAMES WITTIG resumes the stand, having been previously sworn, and testifies as follows:

* * *

Q Your testimony on Friday was that Jeff was overtly involved in the political campaign. Is that correct?

A Correct.

* * *

[6.16] Q Now, you transferred Officer Heffernan in the middle of a detail. Is that correct?

A Jeffrey, yes.

Q As soon as this happened, you had him transferred. Is that right?

A That's correct.

Q And, sir, with respect to having him transferred, you're the one who actually gave him the assignment for walking. Is that correct?

A Yes.

Q And with respect to the assignment, you could have assigned him anywhere, couldn't you?

A Yes.

Q But you chose to put him in walking. Is that right?

A Yes.

* * *

[6.79] But with respect to the day-to-day operations of the department, you're responsible for that. Correct?

A That's my responsibility.

Q So, with respect to details and changes, none of that needs to be approved by the director of police. Right?

A That's correct.

Q You make those decisions, and you transfer people, and it doesn't have to go to the administration. Is that correct?

A That is correct.

Q You didn't have to run any decision for transferring offices to Mayor Torres. Right?

A That is correct.

* * *

[6.91] Q Isn't it true that officers aren't entitled to any particular assignments?

A That's correct. When you take the job as a police officer, you sign up to be a police officer. All the different jobs are just different jobs within the police department itself.

* * *

[6.93] Q Chief before we broke, you recall we were talking. about transfers that occurred on particular – throughout your career. Correct?

A Yes.

Q And isn't it true that as chief you implement a lot of detail transfers on a regular basis. Correct?

A That's correct.

Q Isn't it true that every detail change always has officers moving throughout the police department. Correct?

A Yes.

* * *

[6.136] PATRICK PAPAGNI, having been duly sworn, testifies as follows:

* * *

[6.142] Q Now, sir, I just want to direct your attention to April 13th, 2006. Did you ever learn that Officer Heffernan was involved in some type of political activity?

A Yes.

Q And when you learned that, did you learn that from a Detective Maes?

A Yes, Detective Maes confided in me.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN Plaintiff, v. CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic] and POLICE DIRECTOR MICHAEL WALKER, Defendants.	Civil Action No. 06-3882 (DMC) (JAD) **STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO F.R.C.P. 56.1(A) IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 8, 2013)

A. Procedural background

1. On August 17, 2009, Plaintiff filed a two count Complaint against Defendants.[1] (*See* Certification of Victor A. Afanador ("Afanador Cert."), Exhibit ("Ex.") A – Complaint.)

[1] Count II of Plaintiff's Complaint, which asserted a claim under the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1, *et seq.*, was voluntarily dismissed with prejudice. (ECF No. 172.)

In addition, please note that Plaintiff voluntarily dismissed all claims against Defendant Police Director Michael Walker. (*See* Afanador Cert., Ex. F – Final Pre-Trial Order at Section 15.)

2. Count I of the Complaint alleges that "Defendants intentionally, wilfully [sic], and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment **right to free speech**." (*Id.* at ¶41.) (Emphasis added.)

3. On January 26, 2009, after discovery was completed, Plaintiff filed a motion for summary judgment, which was improperly characterized as a motion *in limine*, moving the Court to find as a matter of law that Plaintiff engaged in protected speech. (*See* Afanador Cert., Ex. B – Plaintiff's motion *in limine* at p. 1.)

4. Also on January 26, 2009, Defendants filed a motion for summary judgment, which was limited to Plaintiff's First Amendment freedom of speech claim – the only claim pled in Plaintiff's Complaint. (*See* Afanador Cert., Ex. C – Defendants' summary judgment motion.)

5. The Honorable Peter G. Sheridan, U.S.D.J. did not allow the parties to file opposition briefs to these motions.

6. The limited relief sought in Plaintiff's motion was a finding "as a matter of law that the Plaintiff engaged in protected **speech**." (*See* Afanador Cert., Ex. B – Plaintiff's motion *in limine* at p. 1.) (Emphasis added.)

7 The first point heading in Plaintiff's brief was listed as: "Plaintiff's **speech** is protected by the First Amendment." (*Id.* at p. 3.)

8. However, for the first time throughout the course of this litigation, Plaintiff included two paragraphs in the *in limine* motion setting forth the case law for a freedom of association claim, a claim that Plaintiff did not plead in his Complaint or otherwise preserve or pursue throughout this litigation. (*See id.* at pp. 11-12.)

9. Despite the fleeting mention of freedom of association case law, in the Conclusion section of the *in limine* motion, Plaintiff "respectfully move[d] the Court to find as a matter of law that the Plaintiff engaged in protected **speech**." (*Id.* at p. 13.) (Emphasis added.)

10. Since Judge Sheridan ruled that the parties were not able to file oppositions or responsive briefs to the motions for summary judgment, Defendants were not able to object to Plaintiff's attempt to include a newly asserted cause of action in his brief.

11. On February 9, 2009, Plaintiff filed a Trial Brief. (*See* Afanador Cert., Ex. D – Plaintiff's Trial Brief.)

12. In the Trial Brief, Plaintiff argued that his "**speech** is protected by the First Amendment" and requested the Court "to find as a matter of law that Plaintiff engaged in protected **speech**." (*Id.* at p. 6.) (Emphasis added.)

13. Plaintiff included a paragraph in his Trial Brief setting forth law on a freedom of association claim, despite the fact that it was not pled in the

Complaint or otherwise preserved or pursued throughout this litigation. (*See id.* at p. 7.)

14. Even though Plaintiff included case law for a new cause of action in the Trial Brief, Plaintiff limited his relief to contend that he was deprived of "his First Amendment right to **freedom of speech**. (*Id.* at p. 12.) (Emphasis added.)

15. Defendants filed a Trial Brief on the same day that Plaintiff filed his Trial Brief. (*See* Afanador Cert., Ex. E Defendants' Trial Brief.)

16. Defendants' Trial Brief was limited to the sole cause of action pled in the Complaint – the freedom of speech claim. (*See id.*)

17 On February 24, 2009, the parties filed the Final Pre-Trial Order. (*See* Afanador Cert., Ex. F – Final Pre-Trial Order.)

18. In the Final Pre-Trial Order, Plaintiff listed as a contemplated motion "for this Court to find as a matter of law that the Plaintiff engaged in protected **speech**." (*Id.* at p. 2.) (Emphasis added.)

19. Nowhere in the Final Pre-Trial Order was a freedom of association claim listed, must less mentioned, by Plaintiff. (*See id.*)

20. In Plaintiff's Contested Facts portion of the Final Pre-Trial Order, he advised that he intended to prove contested facts with regard to damages, which included "Plaintiff suffered emotional distress when Defendants intentionally, willfully, and recklessly

transferred Plaintiff in order to deny Plaintiff his First Amendment right to **free speech**"; "Plaintiff suffered compensatory and equitable damages as a result of Defendants intentionally, willfully, and recklessly transferring Plaintiff in order to deny Plaintiff his First Amendment right to **free speech**"; and "[t]he Police department [sic] failed to promote Plaintiff to Sergeant as a result of Plaintiff exercising his First Amendment right to **free speech**." (*Id.* at p. 11.) (Emphases added.)

21. In the Final Pre-Trial Order, Plaintiff failed to mention any claim based upon a freedom of association violation. (*See id.*)

22. Furthermore, in the Final Pre-Trial Order, Plaintiff listed his legal issues as:

> 2. Whether defendants violated the provisions of 42 U.S.C. § 1983, in that defendants, acting under color of State law, deprived plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to **freedom of speech**.
>
> 3. Whether defendants intentionally, wilfully [sic], and maliciously transferred plaintiff in order to deny plaintiff his First Amendment right to free speech.

(*Id.* at p. 43.) (Emphases added.)

23. Notably, Plaintiff never asserted a freedom of association claim as a legal issue in the Final Pre-Trial Order. (*See id.* at p. 42.)

24. On April 3, 2009, the eve of trial, Judge Sheridan granted Defendants' summary judgment motion in part and denied same in part. (*See* Afanador Cert., Ex. G – April 3, 2009 Order.)

25. In rendering the decision, Judge Sheridan held that "[t]hat's more like association rights as opposed to a speech right." (*See* Afanador Cert., Ex. H – April 3, 2009 Transcript at 3:7-8.)

26. In addition, Judge Sheridan held "[a]gain that seems like association as opposed to a comment about police officer Heffernan's speech." (*Id.* at 3:10-12.)

27. In conclusion, Judge Sheridan held "[s]o based on the law of the 1st Amendment, especially dealing with the right of association, I find that the plaintiff meets the burden to file and to pursue a 1983 action under that provision." (*Id.* at 4:17-20.)

28. Judge Sheridan then dismissed Plaintiff's freedom of speech claim, but permitted Plaintiff to proceed with a freedom of association claim. (*See id.* at 3:7-8; Ex. G – April 3, 2009 Order.)

29. On April 7, 2009, defense counsel made motions to dismiss the freedom of association claim or, in the alternative, a motion for a continuance to conduct discovery on the freedom of association claim.

(*See* Afanador Cert., Ex. I – April 7, 2009 Transcript at pp. 5-7.)

30. Judge Sheridan denied those motions. (*See id.*)

31. Judge Sheridan permitted Plaintiff to amend his Complaint on the day of trial to include a freedom of association claim. (*See id.*)

32. The case then proceeded to trial over the following two-week period, during which the jury considered whether Plaintiff's First Amendment right to freedom of association was violated.

33. The jury returned a verdict on April 17, 2009.

34. Following the jury verdict, by way of Order dated October 1, 2009, Judge Sheridan ordered that a new trial should be conducted due to a potential conflict of interest. (*See* Afanador Cert., Ex. J – Oct. 1, 2009 Memorandum.)

35. As noted by Judge Sheridan, it was brought to His Honor's attention, following the trial in this matter, that while he was still a named member of the firm Graham Curtain Sheridan, his firm recovered counsel fees and costs as the prevailing party in a case against the City of Paterson. (*See id.*)

36. Therefore, Judge Sheridan, in order to "avoid the appearance of impropriety," set aside the jury verdict and requested that the matter be reassigned for a new trial. (*See id.*)

37 The Honorable Garrett E. Brown, Jr., U.S.D.J. re-assigned the matter to the Honorable Dennis M. Cavanaugh, U.S.D.J. (*See* Afanador Cert., Ex. K – Oct. 7, 2009 Order.)

38. Shortly thereafter, the Honorable Mark Falk, U.S.M.J. held conferences to discuss the case.

39. During the discussions with Judge Falk and in the submissions sent to the District Court, Plaintiff agreed that Judge Cavanaugh's involvement should begin at the time that Judge Sheridan became involved and that *in limine* and summary judgment motions needed to be decided by Judge Cavanaugh.

40. As such, Judge Cavanaugh directed that the motions previously filed before Judge Sheridan should be re-filed for decision by His Honor. (*See* Afanador Cert., Ex. L – May 12, 2010 Letter.)

41. The parties simultaneously re-filed their respective summary judgment motions.

42. By way of Order dated May 23, 2011, Judge Cavanaugh granted Defendants' summary judgment motion and denied Plaintiff's motion *in limine* as moot. (*See* Afanador Cert., Ex. L – May 23, 2011 Order at p. 1.)

43. Judge Cavanaugh noted that [a]n essential factor for an actionable [freedom of speech] claim is that the plaintiff must have engaged in constitutionally protected speech." (*See* Afanador Cert., Ex. L – May 23, 2011 Opinion at p. 4.)

44. Therefore, the District Court dismissed Plaintiff's single claim – a freedom of speech claim – since Plaintiff "never engaged in any political speech, if any speech at all[,]"even if Chief Wittig erroneously believed otherwise. (*See id.* at pp. 4-5.)

45. Plaintiff appealed Judge Cavanaugh's Order to the United States Court of Appeals for the Third Circuit.

46. The Third Circuit heard oral argument on June 28, 2012.

47 In an Opinion by the Honorable D. Brooks Smith, Circuit Judge, the Third Circuit, after noting that "[t]his case [has] a complicated and highly unusual history in the District Court," reversed Judge Cavanaugh's grant of Defendants' summary judgment motion and remanded the matter. (*See* Afanador Cert., Exs. N and O – July 16, 2012 Order and Opinion, respectively.)

48. Specifically, the Third Circuit "instructed [the District Court] to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing." (*See* Afanador Cert., Ex. O – July 16, 2012 Opinion at pp. 8-9.)

49. The Third Circuit emphasized the need for each "party [to have] a full opportunity to respond" by "offering all relevant, reliable evidence," (*Id.* at p. 7.)

50. Based upon Plaintiff's reliance on testimony from the trial before Judge Sheridan in his appellate

arguments, the Third Circuit noted that the trial testimony is "highly relevant" and, for that reason, should be considered by Judge Cavanaugh on remand. (*See id.* at pp. 7-8.)

51. However, Plaintiff failed to apprise the Third Circuit that the trial transcript is incomplete and unreliable and, hence, cannot be relied upon by the District Court.

52. With respect to Plaintiff's freedom of speech claim, the Third Circuit stated that "[w]e do not reach the question of the viability of Heffernan's Free Speech claim. The District Court should re-examine that claim in light of the full record and the parties' supplemental briefing." (*Id.* at p. 10.)

53. With respect to a possible freedom of association claim, the Third Circuit noted that "Judge Cavanaugh's opinion made no mention of Heffernan's Free Association claim" and "that the able District Judge erred by failing to address Heffernan's Free Association claim." (*Id.* at pp. 5, 9.)

54. Specifically, the Third Circuit directed:

> We hold solely that it was error for the District Court to enter judgment in favor of Defendants after discussing only Heffernan's Free Speech claim, considering that Heffernan had previously obtained a jury verdict on his Free Association claim. On remand, the District Court should consider the extent to which Heffernan prosecuted his Free Association claim and whether Defendants

> timely objected to trial of the Free Association claim. The District Court should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial.

(*Id.* at p. 10.)

55. Following the Third Circuit's reversal and remand, this Court set down a dispositive motion briefing schedule, pursuant to which Defendants respectfully submit this joint application for summary judgment as to all claims asserted, and to be asserted, by Plaintiff.

B. Factual background

56. As stated *supra*, Plaintiff alleges in the Complaint that Defendants "intentionally, wilfully [sic], and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment **right to free speech**." (*See* Afanador Cert., Ex. A – Complaint at ¶41.)

57 Specifically, Plaintiff alleges that he was transferred to the Traffic Division in retaliation for putting up signs supporting Lawrence Spagnola, who was running for Mayor of the City of Paterson in 2006 against incumbent Defendant Mayor Jose Torres. (*See id.* at ¶¶14-15, 25, 27.)

58. Plaintiff also alleges that his mother, a resident of Paterson and supporter of Spagnola,

requested that Plaintiff assist her in acquiring a larger sign for her lawn. (*See id.* at ¶¶14, 17, 19.)

59. On April 13, 2006, Plaintiff and his son were parked in his car waiting for City Councilman Aslon Goow to give him this sign. (*See id.* at ¶21.)

60. At no point in Plaintiff's Complaint does he allege that he was hanging signs, either with Councilman Goow or for his mother, in support of Spagnola's candidacy.

61. To the contrary, Plaintiff has repeatedly claimed that he was *not* hanging signs and did not engage in any political activity whatsoever during the 2006 campaign. (*See* Afanador Cert., Ex. P – Plaintiff's Dep. at 61:17-63:6.)

62. Plaintiff took *no* position in the election and was ineligible to vote since he was not a resident of the City of Paterson. (*See* Afanador Cert., Ex. A – Complaint at ¶16.)

63. Plaintiff testified during his deposition that (1) "[he] wasn't working on the campaign, period"; (2) "[he] got [his] signs, and [he] went to [his] mother's house, dropped it off [and] didn't even put it up"; and (3) "[he] wasn't going to post [the sign] [and] didn't have tools" to even put it up. (*See* Afanador Cert., Ex. P Plaintiff's Dep. at 61:6-7, 62:22-25, 133:12-17.)

64. Even during Plaintiff's psychological evaluation with Steven S. Simring, MD, MPH, Plaintiff disclosed that "he picked up a Spagnola lawn sign

only because his mother asked him to do so," that "he had taken no position in the election," that he was "falsely" linked to Spagnola's campaign, and that Defendants' "perceived disloyalty" was unfounded. (*See* Afanador Cert., Ex. Q – Dr. Simring Report at p. 2.)

65. Defendants never contested the "perceived disloyalty" that stemmed from the mistaken belief that Plaintiff had posted signs and was politically involved with Spagnola. In fact, Defendant Police Chief James Wittig testified that he had an office policy prohibiting those who worked in his office from political campaigning. (*See* Afanador Cert., Ex. R – Wittig Dep. at 73, 82-83.)

66. Chief Wittig's policy was implemented to promote a neutral position to the public within Chief Wittig's office. (*See id.*)

67 Chief Wittig is vested with the responsibility to make all assignments in the Police Department. (*See id.* at 7-10, 39:11-17.)

68. Chief Wittig admittedly transferred Plaintiff because he believed that Plaintiff was "overtly [involved] in a political election" and had disregarded the office policy. (*See id.* at 73, 82-83.)

69. By his own admission, Plaintiff did nothing more than pick up a sign for his mother. (*See* Afanador Cert., Ex. P – Plaintiff's Dep. at 62:22-25.)

Dated: March 8, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN **Plaintiffs,** **v.** **CITY OF PATERSON, et al.** **Defendants.**	:	**DOCKET NUMBER:** **Civil Action No. 06-3882 (DMC)(JAD)**

PLAINTIFF'S STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56.1

(Filed Apr. 5, 2013)

I. PROCEDURAL HISTORY

1. On August 17, 2006, Plaintiff filed the Complaint in the instant action (Exhibit E, at A-11-A-19).

2. Plaintiff's Complaint contained two (2) counts, 1) "First Amendment Violations", and 2) "Violation of the Contentious Employee Protection Act." (Id)[1] In Paragraph 42 of the Complaint, located in Count I "First Amendment Violations", Plaintiff alleges that "Defendants' actions were to penalize and retaliate against Plaintiff for his exercise of fundamental First Amendment rights." (Id, at A-17).

[1] Plaintiff ultimately dismissed the CEPA claims prior to trial.

3. On January 26, 2009, Plaintiff filed a Motion in Limine "For this Court to Find as a Matter of Law that the Plaintiff Engaged in Protected Speech." In this Motion, Plaintiff not only argued that his conduct constituted protected *speech*, but he also argued that it also was protected by his First Amendment Freedom of Association. Exh. "LL"

4. Also on January 26, 2009, Defendants filed a Motion for Summary Judgment, arguing that Plaintiff did not engage in protected speech. Defendants did not raise Plaintiff's freedom of association claim in their brief.

5. Judge Sheridan did not permit response briefs to be filed by either party with regard to Plaintiff's motion in Limine or Defendants' Motion for Summary Judgment.

6. On February 9, 2009, both Plaintiff and Defendants filed their respective trial briefs. In Plaintiffs' trial brief, he again raised the issue of Plaintiff's Freedom of Association rights (Exh. "MM", A-119-A-132).

7 On February 24, 2009, a pre-trial Order was entered, stating, *inter alia*, the following legal issues for Plaintiff: "1) Whether Plaintiff was demoted and transferred in direct retaliation for his First Amendment rights; 4) Whether Plaintiff was demoted in direct retaliation for his exercise of protected activities; 5) Whether Plaintiff was denied promotion in direct retaliation for his exercise of protected activities; 6) Whether Plaintiff's assignments to walking

and to cell block were assignments of punishment in retaliation for his exercise of protected activities; Whether Plaintiffs continued removal of his weapons was retaliation for his exercise of protected activities 8) Whether the removal of Plaintiff's private weapons was in direct retaliation for his exercise of protected activities." (Exh. "KK", A-62).

8. Further, Defendants' legal issues included, *inter alia*, the following: "1) Whether Plaintiff was engaged in political activity that would afford Plaintiff protection pursuant to the First and Fourteenth Amendments; 3) Whether Plaintiff's actions are protected under the First Amendment." Id. at A-62-A-63.

9. On April 3, 2009, Judge Sheridan denied Defendants' Motion for Summary Judgment (Exh. G, A-142-A-143).

10. On the record, Judge Sheridan stated that Plaintiff had a cognizable First Amendment Freedom of Association claim (Exh. F, A-133-A-141).

11. In doing so, the Court relied on statements that it was Plaintiff's "political affiliations" and "overt[ ] involvement in the political election" was the cause of the retaliation Plaintiff faced (Id. at A-135, 1.9-10).

12. Further, Judge Sheridan stated that "there is little doubt that the Plaintiff was seen holding a sign of Spagnola's who was running for mayor and he was with this other councilperson, Mr. Goow, who was a party or political affiliate with Spagnola." (Id., A-136,

1.69). As such, the Judge denied Defendants' Motion for Summary Judgment and allowed Plaintiff to proceed on an *association* claim against Defendants.

13. As such, this case proceeded to trial before the Honorable Peter Sheridan on the issue of, *inter alia*, whether Plaintiff's First Amendment rights of freedom of association were violated. Moreover, the verdict slip chosen by Judge Sheridan specifically asked whether Plaintiff's Freedom of Association rights were violated by Mayor Torres, Chief Wittig, and the custom, practice, policy statement, or policy decision by the City of Paterson (Exh. H, A-144-A-146).

14. With regard to the scope of Plaintiff's claims, Judge Sheridan was clear that said claims involved both speech and association. "The final pretrial order set up the issue with regard to association and speech," and that "both the parties knew the scope of the issue." (Exh. BB, A-271, 1.16-18).

15. Moreover, when Judge Sheridan denied Defendants' Motion for Summary Judgment on April 3, 2009, (Exh. "G", A-142-A-143), Judge Sheridan based this ruling in part on the breadth of the pre-trial Order, and therefore stated on the record that Plaintiff had set out a cognizable First Amendment Freedom of Association claim (Exh. "F", A-133-A-141).

16. Further, Judge Sheridan stated that "there is little doubt that the Plaintiff was seen holding a sign of Spagnola's who was running for mayor and he was with this other councilperson, Mr. Goow, who was a

party or political affiliate with Spagnola." (Id., at A-136).

17. Moreover, at the outset of the first full day of trial, Judge Sheridan rejected Defendants' counsel's argument that the association claim was a "surprise" In doing so, Judge Sheridan ruled that Plaintiff's pleadings were sufficient as to the association claim and that the scope of the terms of the pre-trial order included an association claim. Specifically, Judge Sheridan stated the following:

> ***I had the issue from Mr. Afanador with regard to the surprise as this being an association case as opposed to a speech case.*** I do note one interesting issue and I didn't know – but there was a case last year Judge Simandle. Had by a police officer against a police chief. In that case, although it was an association case, the chief was demoted or did something to this officer because of his relationship with the union. But at any rate, the judge charged it's as an affiliation case but throughout his opinion he talked about the speech parts of it so it was kind of a combination of both of them. I just want to let you know that. But at any rate, my view – and I read the Shultz versus Calli case and the Warner versus – 267 F.3d 288. The Warner case the problem was that there were insufficient facts disclosed prior to trial in a security transaction. ***We don't have that here. Discovery was entirely complete. All parties had all the facts that were necessary for them to proceed.*** So, I

don't see that the case is like the Warner case. With regard to the Shultz v. Calli, that's an interesting case because it goes into a lot of different things and one of them was, the plaintiff pled jurisdiction incorrectly and somehow it came up during the trial I guess and then at the end of it, it became a huge issue if there was a federal case involved. At any rate, it was sent back down to the District Court to comply with its turn-around. ***But the truth of the matter was that there was insufficient pleadings and there was a hole in the case as to a number of facts and the pleading of them. In this case, we don't have that either. We have a case where discovery was substantial. A number of people were deposed. There was a final pretrial order. The final pretrial order set up the issue with regard to association and speech.*** I got two motions on that summary judgment from the defendant and a motion in limine, I think, it was from the plaintiff asking me to declare that there was a violation of the First Amendment and he put it in different terms, one on association and one on free speech. ***But both the parties knew the scope of the issue. Everybody had time to plead their cases and to put their defenses and the plaintiff putting forth his case with more than reasonable time.*** So, I don't see from the cases cited would be controlling in this case and ***I'm going to allow the case go forward as it is.***

Exh. "BB", A-270:10-A-272:3.

18. As such, this case proceeded to trial before the [sic] Judge Sheridan on the issue of, *inter alia*, whether Plaintiff's First Amendment rights of freedom of association were violated.

19. Moreover, the verdict slip chosen by Judge Sheridan specifically asked whether Plaintiff's Freedom of Association rights were violated by 1) Mayor Torres, 2) Chief Wittig, and 3) the custom, practice, policy statement, or policy decision by the City of Paterson (A-144-A-146).

20. With regard to the scope of Plaintiff's claims, Judge Sheridan was clear that said claims involved both speech and association. "The final pretrial order set up the issue with regard to association and speech," and that "both the parties knew the scope of the issue." (A-271).

21. On April 17, 2009, judgment was entered in favor of Plaintiff with regard to Defendants Wittig and Torres in the sum of $105,000 ($75,000 in compensatory damages, $30,000 in punitive damages), but entered against Plaintiff with regard to the City of Paterson (Exhibit R, A-180, doc. 80).

22. While post-trial motions and Defendants' appeal to the Third Circuit were pending, Judge Sheridan recused himself on October 1, 2009 (Exhibit J, A-148)[2] and Ordered a new trial (Exhibit I, A-147).

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[2] Judge Sheridan's recusal was based on the fact that, while post-trial motions were pending, Judge Sheridan brought to the

(Continued on following page)

23. The case was then assigned to Judge Cavanaugh (Exh. K, A-149).

24. On April 19, 2010, Defendants' counsel wrote to the Court and requested that Judge Cavanaugh render a decision on all issues addressed by Judge Sheridan prior to trial (Exhibit M, A-152-A-155). In said letter, Defendants' counsel states that Judge Sheridan did not permit opposition or response briefs to Defendants' Motion for Summary Judgment or Plaintiff's Motion in Limine to find that Plaintiff engaged in Protected Speech. Id.

25. In response, Judge Cavanaugh initially ruled that Judge Sheridan's rulings with regard to the aforesaid motions be adopted and set a trial date for September 14, 2010. Exhibit Q, A-166.

26. On April 28, 2010, Defendants' counsel wrote to the Court and again stated that parties had *not* been provided with an opportunity to file response briefs with regard to Defendants' Motion for Summary Judgment and Plaintiff's Motion in Limine. As such, Defendants' counsel requested oral argument "to address any questions which Your Honor may have concerning the motions and provide counsel an opportunity to be heard." (Exhibit O, A-161-A-163).

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attention of counsel that His Honor's former firm, a number of years earlier while Judge Sheridan was on the bench, settled a civil rights case with the City of Paterson.

27 On May 7, 2010, Plaintiff's counsel requested that additional briefs be filed with regard to the aforesaid motions (Exhibit P, A-164-A-165). Plaintiff stated that a reason for this belief was that parties now not only had the record from discovery, but also had testimony from trial. Id. Plaintiff also requested that the pre-trial Order be amended for the same reason. Id.

28. However, on May 12, 2010, the Court Ordered that the aforesaid motions be entertained by the Court, but that no additional briefs would be filed, nor would any additional evidence be presented. Exh. "Q" Further, Judge Cavanaugh also ruled that the Pre-Trial Order not be amended. Id.

29. From September 21-24 2010, the motions for summary judgment and *in limine* were re-filed, per the Judge's Order (Exh. R, A-187-A-189).

30. On May 23, 2011, Judge Cavanaugh granted Defendants' motion for summary judgment (Exh. C, A-4; Exh. D, A5-A10). However, the issue of Plaintiff's Freedom of Association claim was not addressed in His Honor's Opinion. Id.

31. In His Honor's Opinion, Judge Cavanaugh ruled that Plaintiff had not engaged in protected speech, or even speech at all. Id. Accordingly, the Court granted summary judgment and dismissed all claims. Id.

32. Plaintiff filed a notice of appeal on June 17, 2011 (Exhibit "A").

33. The Third Circuit granted this appeal on July 16, 2012. Exh. "JJ"

34. The Third Circuit stated that, related to the speech claim, the trial Court erred in not permitting response/supplemental briefs for the motions for summary judgment, and that the Court also erred in not permitting parties to supplement the record by using testimony adduced at trial. Exh. "JJ", p. 9-10.

35. The Third Circuit then remanded this suit back to the District Court, with the instruction that the Court was to permit new briefing on the motions for summary judgment as to speech as well as to allow parties to file response briefs and cite to the full record in existence at the time of the new briefing. Id.

36. At oral argument, the Third Circuit in oral argument stated that the Defendants had clear notice of Plaintiff's Association claim. Specifically, Judge Rakoff stated the following in response to opposing counsel's argument at oral argument that the pre-trial Order did not include an Association claim:

> JUDGE RAKOFF· "And the pretrial order, points 4 and 5 said, point 4 says, well, the plaintiff was demoted in direct retaliation for his exercise of protected activities. 5 says, well, the plaintiff was denied promotion in direct retaliation for the exercise of protected activities. Now, protected activities means protected activities under the First Amendment. And under the First Amendment, there are a myriad of activities protected.

> One is speech, one is association." Exh. "NN", 18:20-19:3.

Judge Rakoff went further, stating:

> JUDGE RAKOFF· "[Plaintiff's] claim was a First Amendment retaliation claim. That's what the Complaint talked about. In the pre-trial [sic] order not only talks about speech, but it talks about protected activities." Id., at 1.9:17-21.

Moreover, the panel specifically stated that Defendants were on notice of the association claim. As Judge Rakoff stated:

> JUDGE RAKOFF: "So all that was wiped out was the determination of the jury. The fact that you were now on notice, ***unbelievably clear notice, of a Freedom of Association claim*** wasn't wiped out." Id., at 20:9-12. (emphasis added).

Judge Rakoff similarly stated:

> JUDGE RAKOFF: "[N]ow you are on notice because you've had a whole trial of what the claim is." Id., at 18:8-11.

Judge Fisher agreed with Judge Rakoff that Defendants were in fact on notice of the Freedom of Association claim, stating the following:

> JUDGE FISHER: "How could you say you were not placed on notice? You have a Freedom of Association claim that was discussed with Judge Sheridan, it was instructed to the jury that the jury follow. How could you say

> you were not on notice? ***You can't say you weren't on notice. Your other arguments I invite, but you certainly can't sat*** [sic] ***you weren't on notice.***" Exh. "NN", at 22:6-21 (emphasis added).

In fact, when opposing counsel attempted to argue that the instant action was merely a "speech case", Judge fisher interrupted him, stating "It's a retaliation case." Id. 22:22-24.

37 On February 11, 2013 the District Court entered a briefing schedule as to parties' Motions for Summary Judgment. In accordance with said schedule, Plaintiff filed on March 8, 2013 a Motion for Summary Judgment as to Whether Plaintiff Engaged in Protected Speech. Said motion is pending.

38. Also in accordance with the Court's briefing schedule, Defendants filed motions for summary judgment against Plaintiff on March 8, 2013.

II. STATEMENT OF FACTS

39. At all times material, Plaintiff was a police officer with the Paterson Police Department since November 1985 (Exh. CC, A-479, 1.17-19).

40. Plaintiff was initially assigned to Patrol and then to the Communications Division. Id., A-480, 1.5-12.

41. In December 2005, Plaintiff became a Detective assigned to Chief Wittig's office. (Id., at A-480, 1.13-A-481, 1.9).

42. On April 13, 2006, while off duty, Plaintiff drove into Paterson to collect a campaign yard sign for the campaign of Lawrence Spagnola (A-194, 59:9-60:24), the former Chief of Police in Paterson, who was a candidate in the May 2006 mayoral election (A193a, 54:18-55:7).

43. Plaintiff, who is a close personal friend of Spagnola, spoke to Spagnola two or three times per week via phone (Exh. S, A-193a, 56:11-23) and has known him since 1985 (Id).

44. In fact, Chief Wittig, Lieutenant Papagni, and Deputy Chief Fraher of the Paterson Police Department were fully aware that Plaintiff was friends with Spagnola and thought that Plaintiff was "craz[y]" for being Spagnola's friend (Exhibit S, A-196, 67:2-10).

45. Plaintiff was obtaining the campaign sign for his mother, a Spagnola supporter who desired a bigger lawn sign (Exhibit S, A-194, 59:9-14).

46. Plaintiff first called Jimmy Durkin, a Paterson Police Officer who was also the individual who constructed the Spagnola lawn signs (Id., at 59:15-60:23).

47 Durkin instructed Plaintiff to contact Paterson City Councilman Aslon Goow (Id), who was also Spagnola's mayoral campaign manager (Exh. T, A-205, 1.17-18), at the corner of Maitland and Union Avenues in Paterson, NJ, where Goow was gathering with Spagnola supporters to provide them with Spagnola lawn signs. Exhibit S, A-194, 59:15-60:23.

48. Plaintiff then drove to said gathering of Spagnola supporters (Id), spoke to Goow, the Spagnola campaign manager and picked up a Spagnola lawn sign to deliver to his mother, a Spagnola supporter (Exh. S, A-194, 59:15-60:23).

49. When picking up the sign from Councilman Goow (Exh. BB, A-373, 1.2-A-378 1.19), which occurred at appropriately [sic] 2:00-2:10pm (Exh. BB, A-403, 1.4-8; A-411, 1.16-23), Paterson Police Officer Arsenio Sanchez was patrolling in the vicinity when he saw Goow standing in a private front yard, and Jeffrey Heffernan sitting in a nearby car. (Exh. BB, A-283, 1.2-A-284, 1.6).

50. Sanchez worked in Mayor Torres' office as a security officer. Exh. "BB", A-276, 1.4-10.

51. Additionally, Sanchez worked for the Torres Mayoral re-election campaign. Exh. "BB", A-377, 1.5-A-378, 1.2.

52. Upon seeing Sanchez at the campaign gathering, Goow told Plaintiff that officers in the Chief's office hated Goow and that Sanchez was probably on the phone with the Mayor or Chief discussing Plaintiff's presence at the campaign sign gathering (Exh. S, A-195, 62:13-18).

53. Goow's prediction was accurate. As soon as Sanchez saw Plaintiff with a campaign sign, he immediately spoke with Chief Wittig over the phone, setting into motion a swift chain of communication pertaining directly to Plaintiff's political activity of

picking up a Spagnola campaign sign, leading to the retaliation against and transfer of Plaintiff. This phone call is corroborated by cell phone records indicating that Sanchez spoke with Wittig over the phone shortly after seeing Plaintiff (Exh. HH, A-842-A-846).

54. In fact, at trial, Sanchez admitted that a phone call was made between he and Chief Wittig at 2:14pm on the afternoon of the incident (Exhibit BB, A-285, 1.18-A-293, 1.9), and Goow testified that Plaintiff had been at the campaign gathering at around 2:00-2:10pm. (Exh. BB, A-403, 1.4-8; A-411, 1.16-23).

55. As a result of Sanchez's phone call with Wittig only a few minutes after the Heffernan incident, several Paterson Police officers and even the Mayor learned about Heffernan's conduct that very same day.

56. Detective Greco, who worked in the Chief's office (Exh. AA, A-251, 1.8-22) with Plaintiff and Lt. Papagni (Exh. AA, A-252, 1.21-A-253, 1.8), testified that he overheard a conversation between Mayor Torres and Lt. Papagni on the day of the incident wherein it was discussed that Arsenio Sanchez witnessed Plaintiff Heffernan taking a campaign sign (Exhibit AA, A-252, 1.19-A-258, 1.2).

57 Detective Sergeant Greco testified that he had overheard Lt. Papagni on the phone that day angrily saying "he did what?" in a boisterous fashion. Id., at A-254-A-256.

58. Lt. Papagni later told Greco that he had received said phone call from the Mayor regarding Plaintiff, and that Plaintiff had been seen with a campaign sign. Id., at A-256-A-257

59. In fact, Greco testified that Mayor Torres informed Papagni that he (Mayor Torres) was very upset and wanted Plaintiff disciplined and transferred. A-257, 1.18-22.

60. Within a day, Plaintiff was transferred. Id., at A-257-A-258.

61. Further, Papagni admitted at trial that he spoke to the Mayor every day of the year (Exhibit DD, A-777, 1.24-A-778, 1.24; Exh. "V", A-212), which supports Detective Greco's testimony set forth above that Papagni subsequently informed Mayor Torres of Plaintiff's conduct (Exh. AA, A-252, 1.21-A-253, 1.8).

62. While Plaintiff did not personally nail the sign into the yard, he picked up the sign with the express intention to deliver it to his mother, a Spagnola supporter, so that it would in fact be placed in the yard. Moreover, Plaintiff stated that his failure to post the sign in his mother's yard was not a matter of not wanting to engage in political activity; rather, it was simply "because [he] didn't have the tools with [him]." (Exh. S, A-195, 62:23-63:2).

63. Due to the hotly contested nature of this election within the Police Department, Goow stated that he believed that Heffernan's "helping" with the campaign would lead to him being "targeted" in the

Department given the "political climate" that existed (Exh. T, A-203, 1.2-8).

64. In fact, it was clear that there would be "political ramifications" for supporting one candidate over another (Exh. T, A-203, 1.17-18, A-205a, 1.12-15).

65. Goow even told Plaintiff to leave the area just prior to being seen by Sanchez because if Plaintiff was seen with Goow at the campaign site then they were "going to have problems" (Exhibit T, A-204, 1.1-4), and Heffernan was aware of the animosity between Goow and Wittig (Exh. S, A-195, 62:15-18).

66. Goow also noted that Plaintiff would be punished for his "role in the Spagnola campaign" (Exh. "T", 207a, 1.12-13).

67 Deposition and trial testimony indicate that Heffernan did in fact support the Spagnola campaign. At trial, Aslon Goow indicated that Plaintiff had in fact participated in the Spagnola campaign (Exhibit BB, A-405, 1.16-18), and that Plaintiff was a "supporter" of Spagnola (Exhibit BB, A-405, 1.23).

68. At trial, Plaintiff explicitly testified that with regard to the Mayoral race, he "wanted [Spagnola] to win." (Exh. CC, A-486, 1.17-19).

69. Heffernan also testified at trial that the specific manner in which he picked up the sign – by meeting Goow at a gathering of campaign supporters at a remote location and bringing it to his mother's house (Exhibit CC, A-491, 1.16-A-493, 1.22) – was done specifically because it would "help them out,"

referring to the Spagnola campaign (Exhibit CC, A-488, 1.1-9).

70. Plaintiff also stated at trial that he was "associated" with the Spagnola campaign. Exhibit CC, A-637, 1.13-15.

71. Plaintiff at deposition specifically stated that he was "politically affiliated" (Exh. S, A-201, 153:3-5), specifically referring to the campaign sign incident, and that it was this political affiliation that caused him to be retaliated against. Id. See also, Exh. "S", A-193a, 54:1-12.

72. Heffernan was aware that the Mayoral race was an "ugly campaign" (Exhibit S, A-197, 83:3), yet he took the aforementioned actions despite the possibility of retaliation.

73. Moreover, additional officers quickly learned of the Heffernan incident, which was then passed on to Mayor Torres. Lt. Papagni admitted at trial that he learned about the Heffernan incident from Detective John Maes Exh. DD, A-783, 1.11-23, and his cell phone records corroborate this (Exhibit FF, A832-A839; See also, Exh. DD, A783, 1.24-789, 1.6).

74. From Papagni's conversation with Maes, Papagni was informed that Plaintiff was picking up a campaign sign, which Papagni considered "political activity." Exh. DD, A-783, 1.12-13.

75. In fact, later in the afternoon on the day of the incident, Plaintiff called Detective John Maes, who also worked in Chief Wittig's office. Maes and

Plaintiff are friends; Plaintiff called to confirm their lunch plans for the following day. Exh. S, A-195, 64:1-65:18.

76. During that conversation, Maes informed Plaintiff that he heard Plaintiff was putting signs up for candidate Spagnola (Exh. CC, A-494, 1.1-A-496, 1.23) and that as a result, "all hell is breaking loose" at the Chief's office. Exh. CC, A-496, 1.19-20.

77 The following day, April 14, 2006, Lieutenant Papagni, the executive officer for the Chief, called Heffernan to tell him that effective the following Sunday he would be transferred out of the Chief's office. Exh. DD, A-797, 1.18-A-799, 1.3.

78. Further, Chief Fraher stated that he was disappointed that Heffernan got "involved" (Exhibit Z, A-230, 15:22).

79. That day, April 14, 2006, Plaintiff went to the Chief's Office to collect his personal belongings. While there, Lieutenant Patrick Papagni and Deputy Chief William Fraher advised Plaintiff that he was not being transferred because of his job performance, rather, he was being transferred because of his political affiliation to Spagnola. Exh. "S", A-193a, 54:1-12.

80. Plaintiff thereafter was assigned to a walking post (Exhibit DD, A-657, 1.11-A-660, 1.25), which is used as punishment. Exhibit DD, A-681, 1.4-A-682, 1.7

81. Chief Wittig stated that on April 14, 2006, he transferred the Plaintiff to Traffic (Id), where

Plaintiff's duty was to patrol the streets while walking because of his "overtly involvement in a political election." Exhibit W, A-218, 1.4-10.

82. Chief Wittig testified that Traffic was sometimes used as a punishment post. Exhibit DD, A-681, 1.4-A-682, 1.7

83. Sergeant Greco also stated that a walking assignment was used as a punishment post, and that Lt. Papagni informed him of this fact. Exh. "BB", A-324, 1.22-A-325, 1.9.

84. As such, as a result of Plaintiff's actions and his "affiliation with Larry Spagnola", Plaintiff was retaliated against (Exhibit S, A-199, 132:9).

85. Chief Wittig testified that Plaintiff was picking up Spagnola signs which caused Plaintiff to be transferred (Exhibit DD, A-644, L.22-A-646, L.15).

86. Similarly, Deputy Chief Fraher told Raymond Heffernan that Plaintiff became "involved" by picking up a lawn sign (Exhibit BB, A-420, 1.3), and Defendant Mayor Torres testified at trial that obtaining political signs such as the one picked up by Plaintiff may be "political activity" (Exhibit DD, A-759, 1.4-7).

87 Detective Sergeant Greco, who worked in the Chief's office, testified at trial that Plaintiff was retaliated against directly for picking up a Spagnola sign (Exhibit AA, A-257, 1.1-22).

88. This was corroborated by the trial testimony of Plaintiff's brother, Raymond Heffernan, who was also

an officer in the Paterson Police Department, who stated that the retaliation against his brother occurred due to Plaintiff "obtaining a sign for [Plaintiff's] mother's lawn." (Exhibit BB, A-416, 1.24-25).

89. According to Raymond Heffernan, Plaintiff himself was aware that the retaliation occurred solely for him picking up the sign for his mother (Exhibit BB, A-417, 1.14-21).

90. As a result of Plaintiff's actions and his "affiliation with Larry Spagnola", Plaintiff was retaliated against (Exhibit S, A-199, 132:9).

DATED: April 5, 2013

MARK B. FROST & ASSOCIATES

/s/ Ryan Lockman
Ryan Lockman
Counsel for Plaintiff